S. HRG. 98-286

COMPUTERIZED CRIMINAL HISTORY RECORDS

HEARING

BEFORE THE

SUBCOMMITTEE ON

PATENTS, COPYRIGHTS AND TRADEMARKS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

THE NATIONAL SYSTEM FOR INTERSTATE EXCHANGE OF CRIMINAL HISTORY RECORDS

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COMPUTERIZED CRIMINAL HISTORY RECORDS

THURSDAY, MAY 12, 1983

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:28 p.m., in room 226, Dirksen Senate Office Building, Senator Charles McC. Mathias, Jr. (chairman of the subcommittee) presiding.

Staff present: Steve Metalitz, staff director; Lynn Brashears, Maura Whelan, and Margel Lindzey, legislative aides; and Pam Batstone, chief clerk.

OPENING STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR.

Senator MATHIAS. The committee will come to order.

The Chair would like the record to show that, for the first time in history, we are beginning a few minutes ahead of time.

We are marking today the opening of what may be a new chapter in a book that is already too long for some readers. This is the first hearing in the jurisdiction of this subcommittee over privacy issues, and so we are going to revisit a topic which in years past has consumed a great deal of energy in both Houses of the Congress.

Today we are going to examine the national system for interstate exchange of criminal history records, a system in which the advances of information technology have played a role and which promises great benefits to the administration of justice. But I think at the same time it poses some serious potential threats to the privacy interests of Americans.

It has become a cliche that to make good decisions you have to have good facts, good information. The criminal justice systems of the Federal Government and of the States are in the business of making decisions. Every day the people who make these systems work—the police, the prosecutors, the defense attorneys, the judges, the jurors, the probation and parole officers, the correction officials—have to make decisions of the utmost importance to their fellow citizens. They have to decide who is going to be questioned about a crime. They are going to have to decide whose house will be searched, or who is going to be arrested. They have to decide who is going to be prosecuted, on what charges will the prosecution be based, and how to defend against those charges. They have to decide who is going to be summoned to testify, who is going to be cautioned to be silent. They have to decide who is going to be incarcerated, for how long they are going to be locked up, under what

conditions they will be locked up, and whose liberty will be restricted in other ways.

And, of course, in a few cases they have to decide who is going to live and who is going to die. So to make these decisions, and to make them wisely, people need as much relevant information as they can get, and one kind of information that has proved useful is criminal history.

Does a suspect have a prior record, has a witness been convicted of a crime of moral turpitude, has the defendant been arrested while on bail, is the prisoner awaiting sentence an habitual offender?

As the criminal justice systems strain under the weight of more and more investigations, and more and more prosecutions, the need for more timely access to accurate criminal history information increases. For example, in many States across the country the traditional discretion of judges in imposing sentences has been restricted by legislation. Many of these statutes mandate prior criminal records as the most important determinant of the sentence to be imposed. These controls, of course, simply do not work in the absence of complete, timely and accurate criminal history information.

So the development of an effective national criminal history records system ought to lead to better decisionmaking in the criminal justice system. Interstate exchange of criminal history information is important in this era in which the citizenry, the criminal and the law abiding equally, has become highly mobile. Dramatic breakthroughs in computer and communication technology will soon make this essential information instantly accessible to decisionmakers on all levels.

I suppose the reason we are here is because there is a dark side to these bright prospects, and part of it can be summed up in another cliche: garbage in, garbage out. Inaccurate, incomplete, outdated criminal history information is not going to help police or prosecutors or the others in making good decisions. Instead, it may lead them to bad decisions.

When an arrest record is not promptly supplemented with accurate disposition data, a defendant may wrongfully be kept incarcerated before a trial. When the conviction which appears on the computerized rap sheet is ambiguously phrased, an inappropriate sentence may be imposed. And, of course, unlike errors that can crop up in other computerized information systems, the bugs in a criminal history records system can tarnish a citizen's reputation, and limit his employment, or cost him his liberty.

There was a dramatic example of this in the case of Wilbert Lee Evans, who was sentenced to death in Virginia, in the year 1981. The jury specifically relied on evidence of Evans' criminal record in North Carolina in imposing the capital punishment. Last month, the Commonwealth of Virginia, in all its might, majesty, dominion, and power, asked the judge to vacate the death sentence because it was admitted that the records of the defendant's prior convictions were seriously misleading, and otherwise defective. In fact, of the seven previous conviction records introduced into evidence at Evans' trial, only two were properly admissible. So to Evans, the

cost of these computer bugs was 2 years of his life spent on death row.

Inaccurate information is not the only sand that gets into the gears. Irrelevant information can be just as harmful, but the bounds of relevance may be rather broad when criminal history information is needed for a criminal justice purpose.

But when the decision involves employment, or licensure in a field unrelated to the justice system, the question of access becomes much more difficult, much more thorny. Licensing boards and potential employers, of course, would like to know about every contact an applicant has had with the criminal justice system. But you have to balance that desire against the applicant's privacy rights.

And since it is estimated that about 30 percent of the total work force, some 36 million Americans, have had some acquaintance with the criminal justice system, some kind of a record, the issue of noncriminal justice access has to be resolved if the national criminal history information system is to function effectively.

So today we will hear testimony on the quality, that is, the accuracy and completeness of the records which may now be exchanged through interstate computer links. We will also look at the question of who should have access, and the measures taken to secure them against improper access.

We will examine whether the standards currently applicable to record content and quality and security ought to be toughened, and what role the Federal Government is now playing with regard to these concerns, and whether that role needs to be changed.

[The prepared statement of Senator Mathias follows:]

PREPARED STATEMENT OF SENATOR CHARLES MCC. MATHIAS, JR.

Today's hearing marks the opening of a new chapter in what has already proved to be a rather long book. As we convene the first hearing in the jurisdiction of this subcommittee over privacy issues, we revisit a topic which has, in years past, consumed a great deal of energy in both Houses of Congress. Today we will examine the national system for interstate exchange of criminal history records. This system, which the advances of information technology have made possible, promises great benefits to the administration of justice. But at the same time, it poses serious potential threats to the privacy interests of Americans.

It is a cliche that good decisionmaking requires good information. The criminal justice systems of the Federal Government, and of the States, are in the business of making decisions. Every day the people who make these systems work—police, prosecutors, defense attorneys, judges, jurors, probation and parole officers, correctional officials—must make decisions of the utmost importance to their fellow citizens. They must decide who will be questioned about a crime, whose home will be searched, who will be arrested. They must decide who will be prosecuted, on what charges, and how those charges will be defended against. They must decide who will be summoned to testify, who will be cautioned to silence. They must decide who will be incarcerated, and for how long, and under what conditions, and whose liberty will be restricted in other ways. Sometimes, they must even decide who will live and who will die.

To make these decisions wisely, these people need as much relevant information as they can get. One kind of information that is most useful is criminal history. Does the suspect have a prior record? Has the witness been convicted of a crime of moral turpitude? Has the defendant been arrested while out on bail? Is the prisoner awaiting sentence an habitual offender?

As our criminal justice systems strain under the weight of more and more investigations and prosecutions, the need for timely access to accurate history information increases. For example, in many States across the country, the traditional discretion of judges in imposing sentences has been restricted by legislation. Many of these statutes mandate prior criminal record as the most important determinant of the

sentence to be imposed. These controls can't possibly work without complete, timely and accurate criminal history information.

The development of an effective national criminal history records system should lead to better decisionmaking in our criminal justice systems. Interstate exchange of criminal history information is particularly important in this era in which the citizenry, criminal and law-abiding alike, has become highly mobile. Dramatic breakthroughs in computer and communication technology will soon make this essential information instantly accessible to decisionmakers on all levels.

But there is a dark side to these bright prospects. Part of it can be summed up in another contemporary cliche: garbabe in, garbage out. Inaccurate, incomplete, and outdated criminal history information will not help police, prosecutors and the others to make good decisions; instead, it will help them to make bad ones. When an arrest record is not promptly supplemented with accurate disposition data, a defendant may wrongfully be kept incarcerated before trial. When the conviction which appears on the computerized rap sheet is ambiguously stated, an inappropriate sentence may be imposed. Unlike errors that may crop up in some other computerized information systems, the "bugs" in a criminal history records system may tarnish a citizen's reputation, limit his employment potential or even cost him his liberty.

A dramatic example of the dangers of inaccurate criminal history information received wide publicity recently. Wilbert Lee Evans was sentenced to death in Virginia in 1981. The jury specifically relied on evidence of Evans' past criminal record in North Carolina in imposing capital punishment. Last month, the State of Virginia asked the judge to vacate the death sentence. The State admitted that the records of the defendant's prior convictions were "seriously misleading and/or otherwise defective." In fact, of the seven previous conviction records introduced into evidence at Evan's trial, only two were properly admissible. The cost of the bugs in this system: 2 years on death row.

Providing inaccurate information is not the only way to throw sand in the gears of decisionmaking. Irrelevant information can be just as harmful. The bounds of relevance may be rather broad when criminal history information is needed for a criminal justice purpose; but when the decision involves employment or licensure in a field unrelated to the justice system, the question of access becomes much thornier. Certainly licensing boards and potential employers would like to know about every contact an applicant has had with the criminal justice system; but this desire must be balanced against the applicant's privacy rights. Since it's estimated that some 30 percent of the total labor force—about 36 million Americans in all—have some sort of criminal record, the issue of noncriminal justice access must be resolved if the national criminal history information system is to function effectively.

Today we will hear testimony on the quality—that is, the accuracy and completeness—of the records which may now be exchanged through interstate computer links. We will also look at the question of who would have access to these records, and at the measures taken to secure them against improper access. We will examine whether the standards currently applicable to record content, quality, and security ought to be toughened. And we will consider what role the Federal Government is now playing with regard to these concerns, and ask whether, and how, that role needs to change.

We will hear these questions addressed from a variety of perspectives; by representatives of the Federal Bureau of Investigation, by State law enforcement officers, and by scholarly experts in the field of information law and policy. We will begin with a presentation from the Office of Technology Assessment, based on an in-depth study of the issues raised by the development and operation of a national criminal history records system.

These are not new issues. But they are more pressing now than they have been at any time since Congress first examined them, almost two decades ago. My own interest is also of long standing. In 1970, my second year of service in the United States Senate, I proposed that the Law Enforcement Assistance Administration recommend legislation to "promote the integrity and accuracy" of federally funded criminal justice information systems, and to protect the constitutional rights of persons affected. That proposal was enacted into law. Over the next several years, numerous bills, both small and sweeping, were thrown into the hopper; their merits and shortcomings were hotly debated; extensive hearings were held in both Houses. These legislative efforts bore little fruit.

For the last several years, the agencies and the States have had to tackle by themselves the challenges posed by new information technologies, and by new demands on criminal justice systems, with scarcely a hint of guidance from the national legislature. In the words of one of the leading experts in the field, Congress "seemed to have run out of gas."

I hope that our hearing today will at least help to turn the key in the ignition. While the Congress has been coasting, other hands have been on the wheel, and have negotiated some hairpin turns. Our goal today is to get a better idea of the road we've traveled in recent years, and of the crossroads ahead of us. As with many other issues within the subcommittee's jurisdiction, the questions we take up today are made more complex by the lightning pace of technological advances. Our responsibility is to understand that technology, and to guide it in the path which will best serve the interests of all our citizens.

Senator MATHIAS. Without further ado, we will call upon our first panel, the Office of Technology Assessment, Mr. John Andelin, Assistant Director, Science, Information, and Natural Resources Division; and Mr. Fred B. Wood, project director.

Gentlemen?

STATEMENTS OF JOHN ANDELIN, ASSISTANT DIRECTOR FOR SCIENCE, INFORMATION, AND NATURAL RESOURCES, AND FRED B. WOOD, PROJECT DIRECTOR, OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS

Mr. ANDELIN. Thank you, Mr. Chairman. We are pleased to appear before you this afternoon on behalf of OTA.

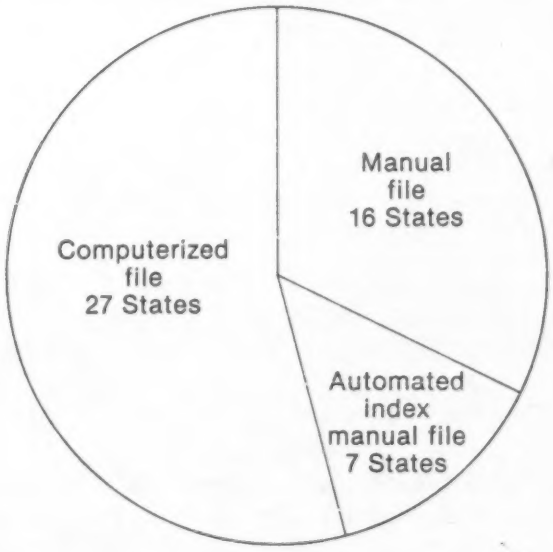
With me this afternoon are several staff from our program on communication and information technologies, including Dr. Fred Wood, on my right, who served as the project director for our study on alternatives for a national computerized criminal history system. Following my opening remarks, Dr. Wood will present the key findings and conclusions of the OTA study.

As you know, OTA's mandate is to assess both the beneficial and adverse consequences of technological change, and to identify and analyze relevant policy options for consideration by the Congress. Computer and communication technology is perhaps the most pervasive and dynamic technology in America today. As a result, several committees of Congress, including the Senate Committee on the Judiciary, asked OTA to assess the impacts of this technology on privacy, security, constitutional rights, and other areas of concern. In response to these requests, OTA has completed in-depth studies of electronic mail, educational technology, and—the subject of this hearing—computerized criminal history systems.

The computer and communication revolution is here to stay in the area of criminal history records. Since 1970, when the Congress first took legislative action on this subject, 27 States and the Federal Bureau of Investigation (FBI) established computerized criminal history files. These 27 States account for about 85 percent of criminal record activity, as shown in chart No. 1. Over 20 million Federal and State criminal history records are now computerized, as indicated in chart No. 2. There are now two nationwide networks for the electronic exchange of criminal history information—the National Law Enforcement Telecommunications System (NLETS) and the National Crime Information Center (NCIC) Communication System.

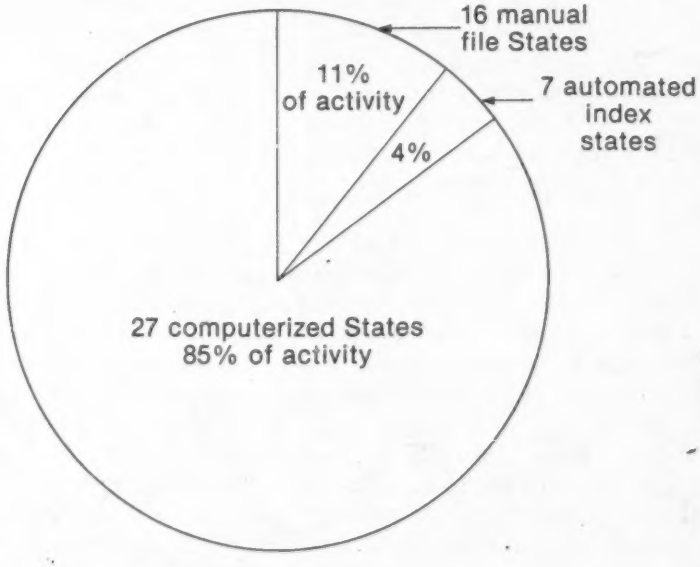
[Charts 1 and 2 follow:]

Chart 1. **State Criminal History Files, 1982**



SOURCE: Office of Technology Assessment.

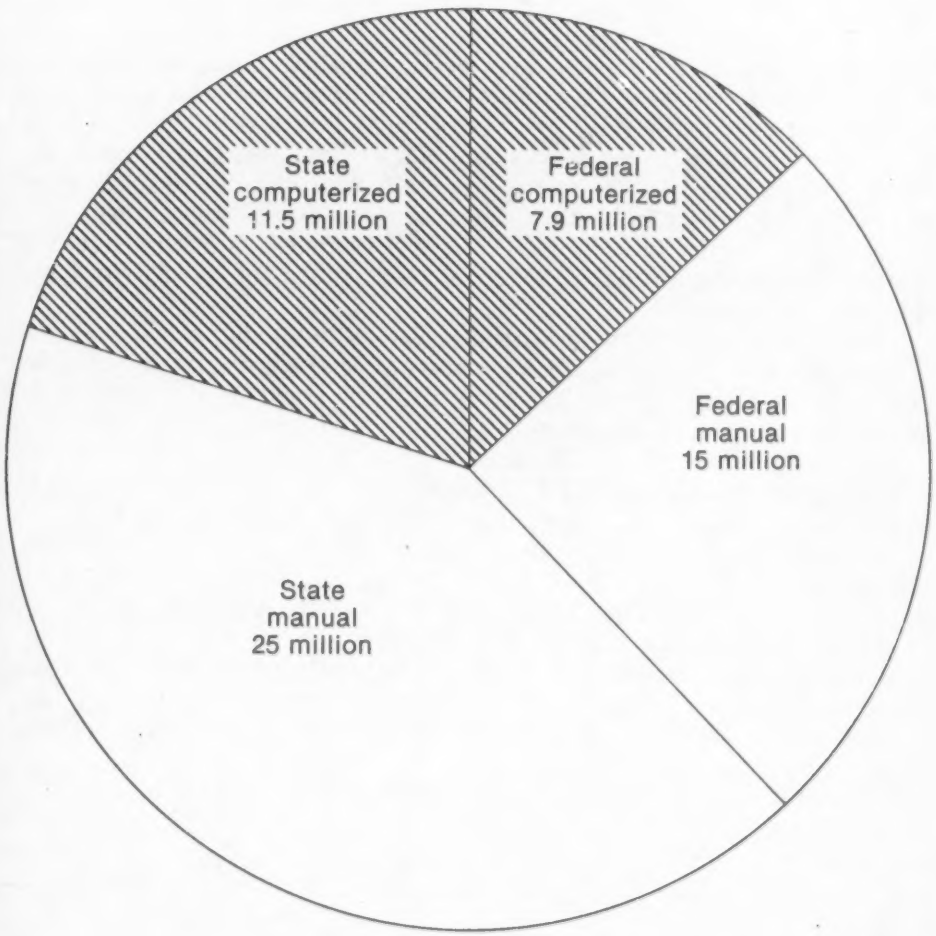
State Criminal History Record Activity, 1981



SOURCE: Office of Technology Assessment, FBI, based on percentage of 1981 criminal fingerprint card submissions to FBI.

Chart 2.

Federal and State Criminal History Records, 1981



SOURCE: Office of Technology Assessment, FBI.

Mr. ANDELIN. Despite this already extensive use of computer technology, on a national level, the sum is less than the parts. We as a nation do not yet have a system that can consistently exchange complete and timely criminal history information. Why is this? It is not the technology, which permits a variety of technical alternatives.

The crux of the matter is that any effective national computerized system impacts issues that have been debated, sometimes heatedly, for 13 or more years. These issues involve Federal versus State responsibility for record collection, maintenance, update, and dissemination; the need to protect the public safety versus the need to protect the constitutional rights of those accused but not convicted and to encourage rehabilitation of ex-offenders; the need to involve all sectors of the criminal justice community in assuming responsibility for record quality; the requirement to protect the privacy and security of criminal history records; and the need to insure that any national system is used solely for lawful and authorized purposes.

These have proven to be difficult issues over the years, yet the OTA study has concluded that resolution of these issues is possible. However, we also found that resolution of these issues will probably require congressional action, and most properly so, since so many vital interests are at stake.

Again, on behalf of OTA, thank you for the opportunity to appear. Dr. Wood will now highlight the major areas that, in OTA's judgment, warrant the careful consideration of your subcommittee.

Senator MATHIAS. Thank you very much, Mr. Andelin.

Mr. WOOD. Thank you, Mr. Chairman.

With your permission, I will enter my written statement into the record, along with a copy of the summary of the OTA report.

Senator MATHIAS. The full statement will be included in the record.

[The following was received for the record:]

STATEMENT OF FRED B. WOOD, PROJECT DIRECTOR

OFFICE OF TECHNOLOGY ASSESSMENT

UNITED STATES CONGRESS

Mr. Chairman and Members:

Thank you very much for the opportunity to appear before your subcommittee this afternoon. I had the privilege of serving as project director for OTA's study on the prospects for a national computerized criminal history (CCH) system and implications for the privacy and security of criminal history records.

Introduction

Mr. Chairman, the timing of this hearing is most appropriate. We as a Nation are approaching a critical juncture in the development of our national criminal history system. In the coming months, key decisions will be made that can shape the future of this system for years to come.

The Congress of the United States has a long-standing, established interest in the privacy and security of criminal history records and the issues associated with development of a national CCH system. As early as 1970, Mr. Chairman, the Congress enacted your amendment to the Omnibus Crime Control and Safe Streets Act that required the Administration to submit legislation on this subject. For the next 4 years, several bills were debated in both the Senate and the House. While none of these bills was passed, the Congress did enact an Omnibus Crime Control amendment in 1973. This amendment emphasized the need for complete and current records and the protection of privacy and security, and led to promulgation by the U. S. Department of Justice (DOJ) of regulations that became final in 1976.

Since that time, one or both branches of Congress have been involved almost every year in a long string of related issues, for example over the role of the Federal Bureau of Investigation (FBI) and the States in a national system. But no further substantive legislation has been enacted. Indeed, with the exception of FBI charter legislation and certain DOJ appropriation authorization bills, it has been 8 years since Congress last considered

legislation on criminal history record systems. I commend the Subcommittee for initiating a much needed review and oversight of this subject, including whether, at long last, a legislative resolution of outstanding issues can be achieved.

Mr. Chairman, as you know, OTA has conducted a comprehensive study entitled An Assessment of Alternatives for a National Computerized Criminal History System. I would like to bring the results of the study into focus for the Subcommittee. With the Chairman's permission, I will enter my full statement and a summary of the OTA report into the record and highlight the major points.

Current National System

First of all, OTA concluded that the United States already has a national criminal history record system. Criminal history records have been in use in various forms for over 150 years. Today, the FBI and 49 of the 50 states have their own centralized record repositories, frequently known as identification bureaus or crime information centers. The FBI and 27 States have CCH files, and another 7 States have an automated name index to their manual files.

OTA has estimated that about 60 million criminal history records are maintained in Federal and State repositories, with roughly one-third of the records computerized and two-thirds manual. About 40 percent of the 60 million total records are maintained by the FBI, and the other 60 percent by the States. We estimated that the number of annual Federal and State criminal history record disseminations is roughly 20 million, split about evenly between FBI and State disseminations. These records are disseminated largely via the U. S. Mail, the National Law Enforcement Telecommunications System (NLETS), and the National Crime Information Center (NCIC) communication lines.

Thus, the issue is not whether to have a national system. We already have one. The issue is whether the current system is working well enough.

OTA concluded that the current system, while showing significant improvement over the last decade, is still not fully meeting legitimate criminal justice needs, nor is it fully protecting privacy and individual rights.

Unmet criminal justice needs reflect the reality that the current system is incapable of consistently providing complete and accurate information on a timely basis. This is particularly true, for example, in pretrial release and bail decisions, which usually must be made within 36 to 72 hours. Even where more decision time is available, the administrative effort and delays of compiling complete and accurate records can at present be excessive.

An OTA review of dozens of research studies conducted over the last 20 years documented that criminal history information is used in the following criminal justice areas:

- o criminal investigations
- o career crime programs
- o arrest decisions where probable cause is ambiguous
- o post-arrest charging decisions
- o arraignment: setting pretrial release conditions and bail requirements
- o trial: plea bargaining, establishing (or challenging) credibility of witnesses and defendants
- o presentence investigation reports
- o sentencing (especially for repeat offenders)
- o correctional assignments
- o parole decisions.

In addition, OTA validated the findings of previous studies that a

significant percentage of serious offenders (roughly 30 percent) have arrest records in more than one State. And about 75 percent of the so-called multi-state offenders have arrests in at least one non-contiguous State. These findings confirm the need for the interstate exchange of criminal history information.

Criminal history records are also used for a variety of purposes other than criminal justice--primarily for employment and licensing decisions and security checks. OTA found substantial non-criminal justice use--about one half of all FBI Identification Division use in fiscal year 1981 and about one-sixth of State criminal record repository use in 1982 on a national average (45 out of 50 States responding).

While non-criminal justice needs are less time-sensitive than criminal justice needs, both are sensitive to record quality. OTA found significant record quality problems at both the Federal and State levels, and, while record quality has improved since 1970, record quality levels are far short of the standards established under Federal regulations. I will return to record quality in a moment.

Alternatives for a National CCH System

For the last decade or more, several alternatives for using computer and communication technology to develop a national CCH system have been heavily debated. The alternatives considered include:

- national full record repository
- single-state/multi-state concept
- national index concept
- national ask-the-network concept
- regional systems.

The leading candidate at the present time is the Interstate

Identification Index (known as the Triple-I or III for short). From an operational standpoint, the III is intended to:

- o determine whether a specific individual has a prior criminal record elsewhere;
- o obtain key criminal history information, if a prior record exists;
- o utilize positive (fingerprint derived) identification;
- o facilitate record exchange among State and Federal files; and
- o phase out FBI "rap sheets" and criminal history records except for Federal offenders, with State offender records to be maintained only by States.

Based on the results of the OTA study, the benefits and problems associated with the III are likely to be the following.

The III has the potential to speed up record exchange and reduce record duplication when fully implemented. However, the III will not necessarily improve record quality. The III will increase State control over record dissemination, but may complicate efforts to protect privacy and security of criminal history records (due to wide variation in State record quality and in State laws on dissemination). In addition, the III will result in nonuniform record content (e.g., due to variations in State statutes on sealing and purging and on record content) unless nationwide standards are established.

Full implementation of III depends on the cooperation and capability of State criminal history record repositories and identification bureaus, as well as the FBI, and will necessitate various improvements in State capabilities. Further, the III will accentuate the need for broader participation of affected parties in policy oversight, and will require cooperation of law enforcement, judicial, and correctional sectors at Federal, State, and local levels in providing complete, timely, and accurate information.

Basis for Congressional Action

Given these potential benefits and problems with the III, OTA concluded that Congressional action is needed. The basis for such action and for Federal jurisdiction in general, regardless of the specifics, is six-fold.

First, the III or any other viable national CCH system must be truly national in scope. The system by definition will most likely involve, at a minimum, Federal criminal justice agencies, Federal non-criminal justice agencies authorized by Federal statute or executive order, State/local criminal justice agencies, and State/local non-criminal justice agencies authorized by State statute and approved by the U. S. Attorney General.

Second, the III or any other viable system is, by definition, interstate in nature. This is exemplified by interstate criminal mobility (30% of serious offenders with multi-State records) and the need for interstate communication (in making III inquiries and responses). As such, the III is subject to the interstate commerce clause of the U. S. Constitution.

Third, the III or other system will require future Federal funding. This will include, at a minimum, a portion of the annual FBI appropriation for FBI fingerprint identification ($69 million in FY 84), a one-time FBI appropriation for the Automated Identification System known as AIDS ($40 million in FY 84), and a portion of the annual FBI appropriation for NCIC ($10 million for FY 84). In addition, Federal funding would include a portion of any funds that may be authorized and appropriated under the Justice Assistance Act of 1983 (S. 53, H. R. 1338), if enacted, for development of justice information systems.

Fourth, the III will affect implementation of Federal criminal record statutes and Executive Orders such as P. L. 89-554 (criminal justice), P. L. 92-544 (State/local non-criminal justice), P. L. 94-29 (securities industry), P. L. 96-132 (message switching), E. O. 10450 (civilian applicants or employees), E. O. 12065 (military applicants or employees), and E. O. 10865 (military contractor employees).

Fifth, III will affect implementation of Federal privacy and security statutes and regulations including P. L. 93-83 and 28 CFR 20. Past applicability of Federal regulations was based on the fact that all States

received Law Enforcement Assistance Administration (LEAA) funding which directly or indirectly supported criminal justice information systems. Future applicability could be based on the fact that all States participating in III will be partially subsidized through Federal support of Ident, AIDS, and NCIC.

Sixth, the III will affect protection of constitutional rights. The courts have found a relationship between record quality and 4th (privacy), 5th (due process), 6th (counsel), 8th (bail), and 14th amendment (equal protection) rights; and between non-criminal justice dissemination and 1st (association), 4th (privacy), 5th (due process), and 14th amendment (equal protection) rights, and also civil rights under the Civil Rights Act of 1964.

Within this context, I will now briefly discuss specific action alternatives in several of the major issue areas of concern to the Subcommittee.

Record Quality

Mr. Chairman, the quality of criminal history records, that is, their completeness and accuracy, has been of concern to the Congress for at least 13 years. Record quality is critical to both the efficiency of criminal justice decisions and the protection of individual privacy, due process, and equal protection of the laws. The results of the OTA study show that, while improvement has been made, there are still significant record quality problems in urgent need of attention. The major problem is incomplete disposition reporting.

OTA found that, as of 1982, only 13 of 47 States are in substantial compliance with the Title 28 requirements for 90-day disposition reporting. Thirteen States indicated to OTA that less than 50 percent of dispositions are reported. The nationwide average is 65 percent. This means that over one-third of the dispositions that have occurred are not being reported to the State repositories. It is not surprising, then, that OTA found that about 30 percent of FBI criminal history records disseminated in 1979 were missing dispositions, since the FBI at present must depend on information submitted by State and local agencies.

A second part of the problem is that neither the FBI nor the majority of

States conduct record quality audits, defined as comparing the content of the Federal or State record with the information in local police, prosecutor, or court records for a specific case. The FBI and 35 of 46 States, as of 1982, do conduct quality checks on information once received. But only 13 States have ever conducted a record quality audit.

The OTA study results suggest that the Subcommittee should seriously consider statutory disposition reporting and record quality control requirements for the III. For example, this could take the form of mandatory 30- or 60-day disposition reporting and annual record quality audits.

Non-criminal Justice Access

Another priority issue area is access to criminal history records for purposes other than criminal justice. The OTA study documented that such requests constitute a significant percentage of total requests made to State and Federal repositories, close to 20 percent on a Statewide average, with 7 States (out of 45) indicating over 40 percent non-criminal justice requests. There are at least three concerns. First, non-criminal justice requests can overburden record repositories to the point where efficiency is compromised. Second, there is great disparity among and between State and Federal laws and regulations as to who should have non-criminal justice access, to which information, and for what purposes. These differences make it difficult to ensure equal protection under the law in the absence of national standards. And third, given that an estimated 36 million Americans have criminal history records, the impact of record dissemination on individual privacy and employment prospects could be substantial.

At present, non-criminal justice use of the III is prohibited. However, the III will soon have to be opened up for such use. Otherwise, the FBI would be required to maintain a separate record file, and this would defeat one of the main objectives of the III.

Thus, non-criminal justice access is a second area that strongly warrants Subcommittee attention. The OTA study identified several alternatives, such as limiting non-criminal justice dissemination to disposition records only, or, at a minimum, requiring a check on arrest information prior to

dissemination to ensure that the arrest is still active and that a disposition has not occurred. Another alternative is to prohibit non-criminal justice dissemination of arrest information over 6 months (instead of 1 year) old unless the arrest is still active. A recent National Institute of Justice-sponsored study in 14 jurisdictions found that the average time from arrest to final disposition was 6.2 months, and thus 6 months may be more appropriate than the one year standard used in current Federal regulations. In addition, OTA concluded that Congress needs to resolve the current conflicts between State and Federal laws on non-criminal justice dissemination.

Policy Control

Policy control is a third priority issue area. Because about 95 percent of records exchanged by the III are likely to be State records, the States have generally sought a major role in policy control. And, since most State criminal history record repositories are maintained by law enforcement agencies, law enforcement also has sought a major role.

However, the collection of complete, timely, and accurate information depends on cooperation of judicial, prosecutorial, and correctional sectors as well as law enforcement. These sectors seek a larger role. And finally, because the use of criminal history records is so pervasive (by an estimated 64,000 criminal justice agencies and several tens of thousands of non-criminal justice agencies), other affected interests (e.g., defense attorneys, criminal justice planners, civil liberties and minority groups) have sought a role.

At present, policy control is vested in the U. S. Attorney General, who has delegated this reponsibility to the FBI Director. The FBI Director is advised by the NCIC Advisory Policy Board (APB). The APB currently includes 20 elected members (as of September 1982 all are law enforcement; 9 from State police, 7 from State identification bureaus, 4 from city or county police departments) and 6 appointed members (2 each from the judicial, prosecutorial, and correctional sectors). There is also a pending proposal to add 4 appointed members (International Association of Chiefs of Police, National Sheriffs Association, National District Attorneys' Association, and American Correctional Association).

The OTA study concluded that a broadened and strengthened policy advisory mechanism is needed. Even with the proposed additions, the NCIC Advisory Policy Board would not include sufficient representation from the judicial and other non-law enforcement sectors of the criminal justice community, and has no representation from the non-criminal justice sector.

The OTA study identified several options for Congressional consideration, ranging from broadening the existing APB or vesting III policy oversight in the Bureau of Justice Statistics Advisory Board, to establishing a consortium of States or an independent policy control board.

Other Issue Areas

Mr. Chairman, several other issue areas discussed in the OTA report warrant Subcommittee attention, but I will only briefly discuss them here:

Record Content: The size and content of the index will affect III utility to criminal justice decisionmakers, manageability and cost to recordkeepers, and impact on privacy and individual rights. Opinions and laws vary widely on appropriate record content. What types of arrests should be included in the III? Under what circumstances should juvenile offenders be included? When should III entries be purged (e.g., after a set period of time for arrests not leading to conviction)?

Audit: User audit mechanisms are intended to help assure Congress and the public that III (or any other national CCH system) is operating within the boundaries of law and regulation, identify any system problems and possible solutions, and monitor system performance and progress toward meeting statutory and/or regulatory purposes. What types of user audits should be conducted of Federal and State repositories? This is a question of who is using the system and the records and for what purposes, as contrasted with audits of record quality previously discussed. Should the General Accounting Office or some other entity be given statutory audit authority?

Message Switching: Unless all criminal history records were stored in

one place, a national CCH system requires some electronic means to transfer records (and inquiries for records) among the various Federal and State repositories and agencies. The transfer or switching of messages from one State to another through the NCIC computer has been a point of concern. The controversy has centered on balancing technical requirements for an efficient and effective system versus concerns over preemption of States' rights and the potential for monitoring and surveillance. Should the FBI be provided authority to message switch record inquiries but not the records themselves, as proposed under the III?

Funding: Throughout the 1970's, it was Federal Government policy to support the development of State CCH systems and the implementation of Federal regulations. Given this prior investment, the total cost requirements are now much less than they would otherwise be. However, current fiscal constraints generally make it difficult for States to fund necessary additional improvements, and are likely to delay participation of some States in III. Should the Federal Government provide funding to States for development of key capabilities necessary for III participation?

Intelligence Use: Systems like III or NCIC have potential application for intelligence or surveillance purposes. The general concern focuses on use of NCIC for collecting and disseminating information on persons not formally charged with a crime or not having a criminal record, and for tracking or surveillance of individuals based on subjective criteria. On the other hand, various proposals for intelligence or surveillance use of NCIC, while controversial, are believed by some to have significant merit. Should the Congress establish a statutory charter for NCIC or otherwise develop statutory limitations on or controls over intelligence/surveillance use of NCIC or III?

Closing Comment: Need for Legislation

Mr. Chairman, the Congress has an excellent opportunity to resolve the more than decade long debate over a national computerized criminal history

system. Over the next 6 to 9 months, decisions will need to be made on the III, and possibly on many of the other issues central to the debate. If one thing is clear as a result of the OTA study, that is that many of the concerned parties look to the Federal Government and to the Congress for setting the overall direction and framework for a national system, even though the States and other parties desire a major role in the development, operation, and control of the system.

At present, Federal criminal history files and the interstate exchange of criminal history records operate under the general authority of 28 USC 534, 42 USC 3789g(a), and 28 CFR 20, and are subject to a large number of State and Federal statutes and Federal executive orders regarding criminal record content and dissemination. NCIC also has a detailed set of operating procedures. However, there is no specific statute covering the III.

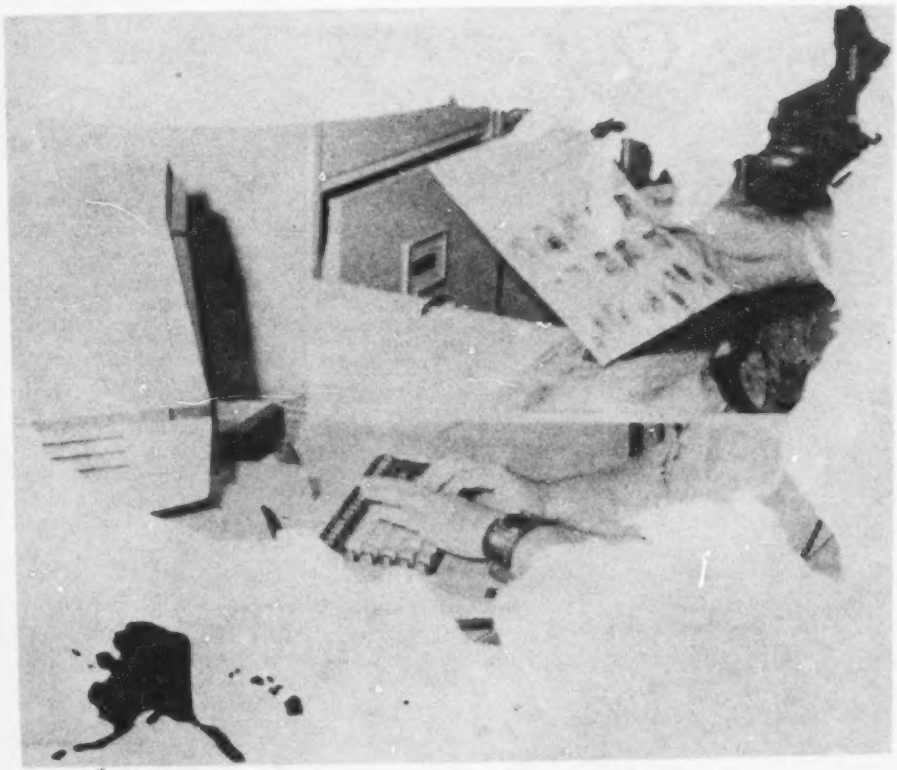
Various advocates believe that legislation is needed to provide a clear mandate for III or any other national CCH system, establish a strong national commitment in terms of political and financial support, specify policy control and management responsibilities, and set appropriate standards for record quality, content, and use. Alternatives to legislation include user agreements among the 50 States and the FBI, an interstate compact, a uniform State criminal history privacy act adopted by the States, and/or development of regulations by the Bureau of Justice Statistics or some other DOJ agency.

The OTA study concluded that legislation appears to be the most appropriate vehicle for guiding the full implementation of a national CCH system such as the III in a way that will enhance the efficiency and effectiveness of the criminal justice process, protect privacy and constitutional rights, and properly balance the roles and responsibilities of the Federal and State Governments.

I thank you for the opportunity to appear today and would be happy to answer any questions that you may have, either this afternoon or for the record.

An Assessment of Alternatives for A National Computerized Criminal History System

Summary



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The Technology Assessment Board approves the release of this report. The views expressed in this report are not necessarily those of the Board, OTA Advisory Council, or of individual members thereof.

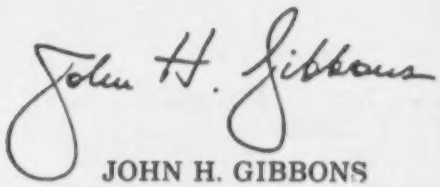
Foreword

This summary presents the major findings of *An Assessment of Alternatives for a National Computerized Criminal History System.* The study addresses: 1) the status of criminal history record systems in the United States; 2) the alternatives for a national computerized system; 3) the possible impacts of such a system; and 4) the relevant policy issues that warrant congressional attention.

Conducted at the request of the House and Senate Committees on the Judiciary, this study is the last of four components of the OTA assessment of Societal Impacts of National Information Systems. The other components include a September 1981 OTA report on *Computer-Based National Information Systems: Technology and Public Policy Issues;* a March 1982 background paper on *Selected Electronic Funds Transfer Issues: Privacy, Security, and Equity;* and an August 1982 OTA report on *Implications of Electronic Mail and Message Systems for the U.S. Postal Service.*

In preparing the full computerized criminal history report, OTA has drawn on working papers developed by OTA staff and contractors, extensive related research on criminal history record systems carried out by SEARCH Group, Inc., and others, and operating data and descriptive information provided by the Federal Bureau of Investigation and various States. The final draft of this report was reviewed by the OTA project advisory panel and by a broad spectrum of interested individuals and organizations from the criminal justice community.

OTA appreciates the participation of the advisory panelists, external reviewers, and others who helped bring the study to fruition. It is, however, solely the responsibility of OTA, not of those who so ably advised and assisted us in its preparation.



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Alternatives for a National Computerized Criminal History System

Overview

The United States already has a national criminal history system. It is partly manual and partly computerized, and includes criminal record and fingerprint card repositories maintained by the Federal Bureau of Investigation's (FBI) criminal identification file (known as Ident) and 49 State identification bureaus. The national system also includes the computerized criminal history (CCH) files in the FBI's National Crime Information Center (NCIC) and in 27 States. Seven other States have a computerized name index to their manual files, and 10 more States are in the process of implementing a computerized index. As of October 1981, Ident held about 6 million automated criminal history records, NCIC/CCH held about 1.9 million, and the 27 State CCH files collectively held about 11.5 million records. For the interstate exchange of criminal history records, the national system uses the U.S. Mail, the NCIC communication network, and the National Law Enforcement Telecommunications System (NLETS). The many local and metropolitan criminal history record systems, either manual or automated, are also part of this national system.

Thus, most of the building blocks for a national *computerized* criminal history record system are already in place. Technically, there are many ways that a national CCH system could be designed. At one end of the spectrum, criminal history records for all offenders could be stored in a central national repository. At the other end, a national repository could be limited to records of Federal offenders, with records of State offenders stored only in the respective State repositories. The emerging consensus among Federal and State criminal record repository and law enforcement officials favors the latter, with only Federal offender records and an index to State offenders (known as the Interstate Identification Index or "III") maintained at the national level along with a national fingerprint file on serious criminal offenders.

Criminal history records are used at all levels of government, by all sectors of the criminal justice community, and increasingly by the noncriminal justice community as well. To the extent that a national CCH system provides information that is more complete, timely, and verifiable (based on positive identification) than is presently available,

the system would improve the functioning of the criminal justice process. The most significant improvements are likely to be in the areas of criminal investigations, police booking and intake, pretrial release and bail decisions, and presentence investigation reports. For example, the impact could be particularly significant in pretrial release and bail decisions, which typically must be made within 36 to 72 hours after arrest. If accurate and complete, CCH records could help prosecutors and judges better balance the need to protect the public from harm by defendants out on bail versus the need to minimize the detention of defendants on charges for which they have not been tried under due process of law. The potential contribution of a national CCH system becomes even more important in view of State bail and sentencing reforms that place greater reliance on criminal history information, and the many recommendations of the U.S. Attorney General's Task Force on Violent Crime that involve criminal history records.

Depending on how a national CCH system is controlled and used, the quality of the CCH records exchanged, and the standards set for access and operation, the system could have important implications for employment and licensure, Federal-State relationships, and civil and constitutional rights, as well as for public safety and the administration of justice. Full implementation of III (or any other national CCH system) raises a number of issues that warrant congressional attention to ensure that beneficial impacts are maximized and potentially adverse impacts are controlled or minimized.

Policy Control.—Considerable debate has focused on which agency or organization(s) should have direct policy control over a national CCH system. Suggestions include a consortium of States, a broadened and strengthened NCIC Advisory Policy Board (APB), an independent board, and/or the FBI. For example, a strengthened APB could include greater representation from the prosecutorial, judicial, correctional, and public defender sectors than at present, and could include an "advise and consent" role, at least with respect to State and local participation in a national system. There are many other possibilities, but the key issue is how to devise a mechanism that will effectively represent the interests of the diverse users of a national system, and afford them a strong and possibly controlling role.

Record Quality.—Since 1970, Congress has expressed its concern about the completeness and accuracy of criminal history records. Based on the results of record quality research conducted by OTA and others, the quality of criminal history records at the State level has improved; however, significant problems remain, especially with respect to court disposition reporting. The average nationwide disposition reporting level increased from 52 percent in 1970 to 65 percent in 1979, but has changed little since then (to 66 percent in 1982). Fourteen of 41 States in 1979 and 13 of 47 States in 1982 indicated that disposition reporting to the State repositories was less than 50 per-

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cent. In both 1979 and 1982, eight States indicated a reporting level of less than 25 percent.

With a national index, the FBI would no longer maintain non-Federal records, and the problems of record quality in Ident and NCIC/CCH would be reduced. However, the quality of records maintained by the States, as well as the quality of any index based on those records, would still be a matter of concern. The progress made by many States in recent years indicates that continued improvement in disposition reporting is possible but would require a significant further commitment measured in manpower, dollars, and system improvements at the State and local levels. As of August 1982, 49 of 50 States maintain transaction logs of criminal history records disseminated, 35 of 46 routinely employ quality control checks on the accuracy of input data, 30 of 49 have automated or manual procedures for the regular review of court disposition reporting, and only 13 of 49 States have conducted a record quality audit.

File Size and Content.—Under the III concept, the national index would include only names and identifiying information. Index size would depend on what limitations are placed on entries (e.g., with respect to types of offenses and the handling of juvenile offender records), how long entries are kept in the index (e.g., limited retention period for some types of entries), and how the index is initially established and then maintained and updated. The index could have as many as 21 million entries if all persons with arrests for serious or significant offenses were included.

Noncriminal Justice Access.—Significant noncriminal justice use of Federal and State criminal history record systems, coupled with widely varying State statutes defining authorized users and State policies on sealing and purging, has generated concern about control of access to criminal history records. As of fiscal year 1981, about 53 percent of requests to Ident were from noncriminal justice users (30 percent Federal and 23 percent State/local). As of 1982, roughly 15 percent of requests to State CCH systems were for noncriminal justice purposes.

Noncriminal justice access to a national index could be prohibited entirely, or could be permitted only under stronger Federal guidelines than presently exist. A dual index could be established, one for criminal justice use and a second for noncriminal justice use, perhaps with the latter based on disposition or conviction information only. Even under the status quo, access to a national index would require complicated safeguards (which are technically feasible with a computer-based system) to be consistent with a wide variety of existing State laws and regulations, and would require some means to resolve conflicts among State laws, and between Federal statutes and Executive orders and State laws.

Oversight and Audit.—Oversight mechanisms would help assure Congress, the public, and others that a national index (or any other national CCH system) is operating within the boundaries of law and regulation, and to help identify any problems that might emerge. Congress could require an annual report and periodic audits of Federal and State CCH files to help ensure compliance with whatever system standards may be established.

Federal Funding.—Throughout the 1970's, it was Federal Government policy to support the development of State CCH systems and the implementation of Federal privacy and security regulations. However, Federal support has been phased out. The following three areas are possible priorities for further Federal funding: 1) improving court disposition reporting on a nationwide basis; 2) upgrading criminal history record systems in States that are operating manually, or assisting those in the process of automating their name index and/or file; and 3) improving procedures in all States where necessary to assure the accuracy and completeness of criminal history information, to conduct audits of local users, to maintain and periodically review transaction logs, and to train employees and users.

Message Switching.—Unless all criminal history records were stored in one place (e.g., a national CCH repository), a national CCH system would require some electronic means to transfer criminal history records (and inquiries for such records) among and between the various State and Federal repositories and participating agencies. The transfer or switching of messages from one State to another through the NCIC computer has been a point of controversy with respect to the impact on Federal-State relations and the potential for monitoring and surveillance use. There are several message switching alternatives for III. First, inquiries could be switched via NCIC, with records returned via the NLETS message switching system. This approach has been used in pilot tests of III. Second, both inquiries and records could be switched via NCIC. Third, both inquiries and records could be switched via NLETS. Fourth, records could be switched via NLETS and inquiries via NCIC or NLETS. Fifth, the use of NCIC or NLETS could be optional for switching of both inquiries and records. Any Department of Justice or FBI message switching role in a fully operational III (or other national CCH system) would probably require congressional approval.

Federal Direction and Legislation.—In the seven years since Congress last considered legislation on criminal history record systems, both the States and the FBI have made significant progress in improving the interstate exchange of criminal history information and in implementing State and Federal privacy and security regulations. Substantial consensus has developed around III, and pilot tests indicate that III is technically feasible. Nonetheless, absent Federal direction and probably some modest Federal funding, full implementation of III is likely to take many years. Also, further improvement in nation-

wide record quality and some kind of national standards on record access and use are needed. Resolution of conflicts between and among State and Federal laws is a necessity.

Legislation represents one of the strongest measures to provide Federal direction and ensure accountability and control. Legislation could provide explicit authority for a national index or other national CCH system, and include statutory guidelines for its operation and use. In addition to the areas listed above, legislation could address access, review, and challenge procedures; criminal penalties; privacy standards; and possibly a prohibition on unauthorized intelligence or surveillance use of a national CCH system. In sum, legislation appears to be the most appropriate vehicle for guiding the full implementation of a national CCH system in a way that will enhance the efficiency and effectiveness of the criminal justice process, protect civil and constitutional rights, and properly balance the roles and responsibilities of the Federal and State Governments.

Introduction

This report addresses four major areas:

- the status of criminal history record systems in the United States;
- the alternatives for a national computerized criminal history (CCH) system;
- the possible impacts of any such system; and
- relevant policy issues that warrant congressional attention to ensure that the beneficial impacts of a national CCH system are maximized and the possible adverse impacts controlled or minimized.

These areas are of concern because:

- criminal history records are a vital part of the criminal justice process;
- advances in computer and communication technologies can help to improve the completeness, accuracy, and timeliness of such records; and
- the use of criminal history records, particularly when exchanged via a national system, can have important implications for public safety and the administration of justice, employment and licensure, Federal-State relationships, and civil and constitutional rights.

Current Status of Criminal History Record Systems

Criminal History Record Repositories.—Criminal history records are stored at the local, State, and Federal levels. Since 1924, the Federal Bureau of Investigation (FBI) has maintained a national repository

of fingerprint cards and rap sheets in its Identification Division (known as Ident). Forty-nine of the fifty States now have their own criminal history record repositories.

The use of computers is already widespread. Ident has made progress in automating its own operations through the Automated Identification System (AIDS). As of October 1981, almost 6 million of Ident's criminal records had been automated (representing more than one-fourth of the individuals in the criminal file) and fingerprints for about 70 percent of the individuals in the file had been converted to a machine-readable (automated) format. Since 1971, the FBI has also maintained a CCH file in its National Crime Information Center (NCIC), although only eight States currently keep records in this file. As of October 1981, it contained about 1.9 million records, including approximately 0.5 million Federal offender records.

At the State level, as of August 1982, 27 States had CCH files, 7 had an automated name index, and 16 had a completely manual system. Ten of the sixteen manual States are in the process of implementing an automated index, and two are implementing a CCH file. Also, the 27 States with CCH files accounted for about 85 percent of all criminal fingerprint card activity, and collectively maintained about 11.5 million CCH records as of September 1981. At the local level, most major metropolitan police departments use computer-based systems (19 have direct lines to NCIC).

For those 12 States in the process of implementing an automated name index and/or CCH file, the estimated time to completion ranged from 1 month, to 1 year, to an indefinite time period, due largely to variations and/or uncertainties in staffing and funding. With full implementation, all but four States would have at least an automated name index, and two of the four remaining manual States do have plans to automate.

Interstate Exchange of Criminal History Records.—The exchange of criminal history records among the States and between the States and Federal Government can be accomplished in several ways. The exchange of records with Ident is almost entirely by mail, since Ident does not have direct communication lines to the States. Exchange with NCIC/CCH is almost entirely electronic, since NCIC has direct communication lines to all 50 States (49 of which are authorized to access the NCIC/CCH file) and to several Federal agencies. Use of the CCH file involves about 4.4 million transactions annually, but only about 3.5 percent of total NCIC traffic. Only eight States keep records in the CCH file. Of the 10 files maintained in NCIC, the bulk of traffic involves the eight so-called "hot files," which furnish an electronic bulletin board capability used by law enforcement agencies to list wanted or missing persons or stolen properties (e.g., vehicles, guns, and securities). NCIC is currently testing the concept of an Interstate Identification Index (III) in which the NCIC/CCH file includes only records for Federal offenders plus a national index of State offenders,

and the participating States maintain both single- and multi-State offender records.

The exchange of criminal history records can also be accomplished via the National Law Enforcement Telecommunications System (NLETS), a computerized message switching network linking local, State, and Federal agencies. Operated by a nonprofit corporation controlled by the States, NLETS does not hold or manage record files, but provides the capability to switch criminal history records among 49 of the 50 States.

Use of Criminal History Records.—Criminal history records are used at all levels of government, by all sectors of the criminal justice community, and increasingly by the noncriminal justice community as well. During fiscal year 1981, about 18 percent of Ident use was by law enforcement agencies, 29 percent by other criminal justice agencies (e.g., prosecutors, courts, and corrections), and 53 percent by noncriminal justice agencies (primarily for employment and licensing and security checks). About 33 percent of Ident use was by Federal agencies and 67 percent by State/local agencies.

Based on 1979 and 1982 OTA surveys, the use of State CCH repositories was roughly 56 percent by law enforcement agencies, 29 percent by other criminal justice, and 15 percent by noncriminal justice. Data from the 1981 III pilot test suggest that NCIC/CCH is used almost entirely by criminal justice agencies—about 86 percent by law enforcement and 14 percent by other criminal justice (about 12 percent by Federal agencies and 88 percent by State/local agencies).

The picture is a little less clear with respect to noncriminal justice use. As noted above, the use of Ident is already greater for noncriminal justice than for criminal justice purposes, and as of August 1982, 7 of 45 States reported that noncriminal justice use of criminal history records accounted for more than 40 percent of total use. At least 14 States have recently enacted (since 1979) or have pending State legislation or regulations that further broaden noncriminal justice access. Delays resulting from the noncriminal justice workload reached the point where Ident suspended most State and local applicant services (for licensing and employment checks) for fiscal year 1982. These will be reinstated on October 1, 1982, but on a fee-for-service basis.

Multi-State Offenders.—Based on 1979 research, OTA found that about 30.4 percent of individuals in the FBI's Ident criminal file had arrests in more than one State, which closely approximated a 1974 FBI estimate of 30 percent and a 1981 FBI estimate of 33 percent. Based on 1981 data available to OTA for eight States, multi-State offenders ranged from a low of about 3 percent to a high of 36 percent, with Federal offenders excluded. The average was about 12 percent, and only one State was above 16 percent. Nonetheless, the percentage of multi-State offenders appears to be significant. Whether the crimes committed by multi-State offenders tend to be more or less

serious than those of single-State offenders could not be positively determined from information available to OTA. This is an area of possible further study.

Fingerprint Identification.—Criminal justice practitioners believe that, at present, fingerprints are the only reliable and consistent basis for positive identification. The exchange of records based on names alone results in a high percentage of errors due to the frequent use of aliases and similarities among many common surnames. In a 1982 III pilot test, the FBI found that almost one-third of the matches between individuals and records were in error when based on name-searching techniques alone. Both Ident and State identification bureaus process fingerprint cards received from criminal justice agencies, but manual fingerprint processing is extremely time-consuming and labor-intensive, and therefore costly, especially at the high volumes presently experienced. A 1981 FBI survey estimated that 4.16 million criminal fingerprint cards were received annually by State identification bureaus, and 2.91 million criminal fingerprint cards by Ident.

Ident's experience exemplifies the enormity of the problem. As of October 1981, there were 78 million criminal fingerprint cards representing 21 million individuals in the Ident criminal file. During fiscal year 1981, Ident received an average of 12,684 criminal fingerprint cards daily. Surveys conducted for the FBI in 1979 and 1980 indicated that the average Ident response time for processing fingerprint cards was about 36 workdays. As of July and October 1981, the FBI estimated that Ident internal processing time (excluding mailing time) was averaging 27 and 25 workdays, respectively, for all categories of inquiries (both fingerprint checks and name checks). As of July 1982, processing time had improved, at least temporarily, to about 13 days, due to Ident's 1-year suspension of record checks for federally chartered or insured banking institutions and State and local employment and licensing authorities.

There is general agreement that improvement in fingerprint processing time is necessary, particularly to meet needs that arise early in the criminal justice process where decisions must be made very quickly, for example, in bringing charges and setting bail. OTA did not assess specific alternatives for improvement, but major studies have recently been completed by the Jet Propulsion Laboratory (JPL) and the International Association for Identification. However, it seems clear that fingerprint identification is properly viewed as an integral part of any national CCH system and that automated fingerprint classification and search technology offers substantial promise for improvement.

Record Quality.—Since 1970, Congress has expressed its concern about the completeness and accuracy of criminal history records. Section 524(b) of the Crime Control Act of 1973 required the Law Enforcement Assistance Administration (LEAA) to promulgate regulations

to provide safeguards for the privacy and security of criminal history records, including their completeness and accuracy. The 1975 regulations (known as title 28, Code of Federal Regulations, pt. 20) apply to the Federal Government and to all States whose criminal history record systems were federally funded in whole or in part. Federal courts have also ruled on record quality issues. For example, in *Tarlton* v. *Saxbe* (1974) the U.S. Court of Appeals for the District of Columbia ruled that the FBI had a duty to prevent dissemination of inaccurate arrest and conviction records, and had to take reasonable precautions to prevent inaccuracy and incompleteness. Most States now have statutes or regulations requiring agencies to ensure reasonably complete and accurate criminal history information, including timely reporting of court dispositions. The number of States with statutes or regulations on record quality increased from 14 in 1974 to 45 in 1979, and to 49 in 1981.

Based on the results of record quality research conducted by OTA and others, the quality of criminal history records has improved since 1970; however, significant problems remain. For Ident, OTA record quality research found that, based on a 1979 sample of arrest events, about 30 percent of the Ident records that could be verified lacked a court disposition that had occurred and was confirmed by the district attorney in the local area responsible for prosecution. A 1980 study by JPL found that Ident receives dispositions for about 45 percent of the arrests reported. OTA also found that about one-fifth of the Ident arrest events sampled were inaccurate when compared with charging, disposition, and/or sentencing information in local records.

With respect to NCIC/CCH, OTA record quality research found that, based on a 1979 sample of arrest events, about 27 percent of the CCH records that could be verified lacked a court disposition that had occurred. About one-fifth of the arrest events sampled were inaccurate with respect to charging, disposition, and/or sentencing information.

At the State level, a comparison between a 1979 OTA 50-State survey and a 1973 General Accounting Office (GAO) study (based on a 1970 50-State survey conducted by LEAA) shows some improvement in the average level of disposition reporting. The GAO study found the average level to be about 52 percent for the 49 States responding; the OTA study showed an average level of about 65 percent for the 41 States responding. However, the 1979 average for computerized States (with a CCH file and/or automated name index) as opposed to manual States was even higher (about 71 percent compared to 50 percent for manual States). Given that in 1970 only one State (New York) had a CCH system, the results indicated that most of the improvement in disposition reporting over the 1970-79 period was in States with CCH systems. OTA also sampled State records in one major urban jurisdiction in each of three States. For the three urban jurisdictions, disposition reporting was 58, 60, and 85 percent. Several States

contacted by OTA have achieved further improvement in disposition reporting since 1979. However, between 1979 and 1982, average disposition reporting levels for all States responding improved only marginally, to about 66 percent. In the OTA 50-State survey, 14 of 41 States responding in 1979 and 13 of 47 States in 1982 indicated that disposition reporting to the State repository was less than 50 percent. In both 1979 and 1982, eight States indicated a reporting level of less than 25 percent.

Significance of Record Quality Problems.—On the one hand, Federal and State law emphasizes the importance of complete and accurate criminal history records, but on the other, the law authorizes the dissemination of records, whether or not they are accurate and complete, for a variety of purposes. For example, Federal regulations and FBI operating procedures assign agencies that enter records into Ident or NCIC the responsibility "to assure that information on individuals is kept complete, accurate, and current." The FBI helps to maintain the integrity of the NCIC files through automatic computer edits and purges, quality control checks, and periodic record validations by originating agencies. Similar procedures are possible in Ident through the use of AIDS. Yet, with few exceptions, Federal and State law authorizes the dissemination of criminal history records—with or without dispositions—to the criminal justice community. Law enforcement and prosecuting agencies, in particular, find that an incomplete and/or inaccurate record can be useful as a "pointer" to the location of complete and accurate information, even though an arrest-only record is not admissible in criminal trial proceedings under the laws of criminal evidence in most jurisdictions.

With respect to noncriminal justice use, Federal regulations permit dissemination of Ident and NCIC/CCH records without dispositions to Federal noncriminal justice agencies if authorized by Federal statute or Executive order. Dissemination is also permitted to State and local noncriminal justice agencies if authorized by Federal or State statutes and approved by the U.S. Attorney General, except for records without dispositions where the arrest charge is more than 1 year old and is not under active prosecution. At the State level, as of mid-1981, 37 States authorized dissemination of arrest-only records to a variety of State and local noncriminal justice agencies (primarily for employment and licensing purposes), and 27 States authorized such dissemination to private sector organizations and individuals.

In most court cases where the completeness or accuracy of criminal records has been challenged, the balancing of individual rights of privacy and due process versus the maintenance of public safety and welfare has proven a difficult challenge to the courts. Yet the Federal courts have found violations of civil and constitutional rights, particularly when arrest-only information is used in minority employment decisions (see *Gregory* v. *Litton Systems,* 1970) and when arrest information without otherwise available disposition information is used

in criminal justice decisions such as setting bail (see *Tatum* v. *Rogers*, 1979).

Privacy and Security Protection.—While very important, record quality (accuracy and completeness) is only one aspect of privacy and security protection. In enacting section 524(b) of the 1973 Crime Control Act, Congress also stressed the importance of protecting individual privacy by limiting record dissemination to lawful purposes, by permitting individuals to access, review, and challenge their records, and by ensuring the security of criminal history record systems. Title 28 of the Federal regulations required States accepting Federal funding to develop specific policies and procedures in these and other areas.

Since 1974, when statistics were first compiled, the States have made substantial progress. For example, as of mid-1981, over two-thirds of the States had statutes and/or regulations that:

- establish a State regulatory authority for privacy and security of criminal justice information systems (46 States in 1981 compared with 7 in 1974);
- place some restrictions on the dissemination of criminal history information (all States and the District of Columbia in 1981 compared with 12 in 1974);
- establish the rights of individuals to inspect their criminal history records (43 States compared with 12);
- provide criminal sanctions for violation of privacy and security laws (39 States compared with 12); and
- establish the rights of individuals to challenge the accuracy and completeness of record information pertaining to them (35 States in 1981 compared with 10 in 1974).

Nonetheless, even where States have enacted laws or regulations, wide diversity remains in the specific provisions—for example, in sealing and purging procedures, in statutory limitations on criminal history file content, and in the definition of authorized users.

Also, States vary widely in their implementation of privacy and security measures such as record quality audits, court disposition monitoring, quality control checks, and routine review of transaction logs. Based on a 1982 50-State survey, OTA found that only 13 of 49 States responding had ever conducted a record quality audit. Thirty of 49 had automated or manual procedures for the regular review of court disposition reporting, and 35 of 46 routinely employ quality control checks on the accuracy of input data. Forty-nine of fifty States maintained transaction logs of criminal history records disseminated, although most indicated that the logs were reviewed only when a specific abuse was indicated.

Alternatives for a National CCH System

The United States already has a "national criminal history system." It is partly manual and partly computerized, and includes criminal record and fingerprint card repositories maintained by Ident and 49 State identification bureaus. The national system also includes the CCH files in NCIC and 27 States. For the interstate exchange of criminal history records, the national system uses the U.S. Mail, the NCIC and NLETS communication networks, and, to a lesser extent, the communication networks of the Justice and Treasury Departments. The many local and metropolitan criminal history record systems, either manual or automated, are also a part of this national system.

Thus, many but not all of the building blocks for a national *computerized* criminal history record system are already in place. Technically, there are several ways that a national CCH system could be designed. At one end of the spectrum, criminal history records for all offenders could be stored in a central national repository such as Ident. The full development of AIDS or the NCIC/CCH file could constitute a national CCH repository when hooked up to the NCIC (or other) communication lines to permit nationwide electronic access. The repository would include records on roughly 21 million persons with arrests for serious or significant offenses. At the other end of the spectrum, a central national repository could be limited to records of Federal offenders (approximately 0.5 million), and records of State offenders would be stored only in the respective State repositories. An intermediate alternative (known as the single-State/multi-State approach) would be for a national repository to maintain records of all multi-State as well as Federal offenders, with single-State offender records stored by the States.

Given the constitutional prerogatives of the States with respect to criminal justice, and the fact that 49 of the 50 States now maintain their own State repositories, records on State offenders will continue to be maintained by the States whether or not a national CCH system is implemented. Therefore, any State records maintained in a national repository will incur extra costs (to the Federal Government for storing the records and to the States for updating the records). Cost control has thus been one of the driving forces behind efforts to keep the recordkeeping function decentralized so that duplication between the Federal and State Governments is minimal.

For any alternative where all records are not maintained in a central repository, two other capabilities are necessary—an index to records not stored centrally, and a means to exchange or transfer records stored in 50 or more locations. There are several technical options here. For example, a national index could be maintained centrally at one location, such as Ident or NCIC in Washington, D.C. or NLETS in Phoenix, Ariz. Records could be exchanged via the NLETS or NCIC communication networks or both.

Regional systems have also been proposed. However, OTA found little evidence to support the feasibility of regional systems. On the contrary, NLETS traffic logs indicate that criminal history traffic between the States does not conform to regional patterns. During the 1981 III pilot test, almost three-quarters of the hits on Florida records (matches between an inquiry and a record) originated from the Midwest and West. In addition, the 1979 OTA record quality research found that a high percentage (about 75 percent for Ident) of multi-State offenders had arrests in at least one noncontiguous State.

A so-called "ask-the-network" system is also a technical possibility. In the ask-the-network approach, there would be no central index. Instead, each State would, in effect, poll any or all of the other 49 States plus the FBI when seeking CCH information. OTA found that a significant percentage of multi-State offenders (about 43 percent for Ident, again based on 1979 data) had arrests in three or more States. Considered together with the high percentage of multi-State arrests in noncontiguous States, it appears that all States and the FBI would have to be polled every time in order to make sure arrests were not missed, but the inquiry-to-hit ratio would then be very low. Under similar circumstances, NLETS found that many States began to ignore the inquiries. Also, the FBI and various State criminal justice officials believe that an ask-the-network approach would not be cost effective, and would be harder to secure against unauthorized access. Nonetheless, ask-the-network systems are used successfully in the defense intelligence community and in the private sector, and their potential use in a national CCH system is an area of possible further research.

Improving Response Time.—The operating experience of the Ident AIDS program and several State identification bureaus has documented that a much shorter turnaround time is possible with automated systems than with manual. The JPL study of AIDS concluded that full automation could reduce the overall Ident processing time for fingerprint checks from about 36 workdays to about 3 hours. Further improvements could result from the use of high quality facsimile electronic transmission. For example, New York State already makes relatively extensive use of this technology. New York responds to fingerprint inquiries submitted via facsimile within an average of 1 hour and 50 minutes, and within 3 hours 90 percent of the time.

The response times for computerized criminal history record checks could be even faster. In theory, the response time for a national CCH repository would be measured in seconds. Indeed, as of April 1982, NCIC/CCH processing time was averaging less than one-half second per inquiry, with very few inquiries taking more than 5 seconds. The III pilot test has demonstrated that even for a national index alternative, response times of less than an hour are possible. During a February-March 1982 test, response time was less than 1 hour 96 percent of the time, less than 5 minutes 76 percent of the time, and less than 1 minute 48 percent of the time. Thus, it appears that the III response

time could approach the response time achieved by individual States with online CCH files, which is frequently in the range of 5 to 20 seconds. Response times for States with manual files would be considerably longer.

Improving Record Quality.—While computerization can improve the response time of fingerprint and criminal record checks, improvements in record quality are more difficult to achieve. This is because high record quality depends on timely and accurate submissions from a large number of criminal justice agencies. Court disposition reporting appears to be a significant problem in many States.

Available evidence indicates that strengthening State and local criminal history systems and court disposition reporting systems is a prerequisite to further improving CCH record quality, regardless of the national CCH system structure. Particularly important are efforts to upgrade court administration, establish standardized (and perhaps even codified) court reporting procedures, improve the coordination between judicial and other criminal justice agencies (especially law enforcement) responsible for timely record update actions, strengthen field audits of reporting procedures and record quality, and increase funding and technical assistance to implement computer-based systems where appropriate.

Shifting Preferences on System Structure.—An OTA survey of State repository officials found that, as of 1979, officials from 24 States out of 42 responding preferred the national index alternative, known as III. Officials from 11 States preferred the single-State/multi-State alternative. Since that time, many other Federal and State officials have shifted their support to III. The NCIC's Advisory Policy Board, NLETS Board of Directors, and SEARCH Group, Inc., have all endorsed III which, if fully implemented, would mean that all State records would be maintained by the States themselves. Only Federal offender records and an identification index would be maintained at the national level.

In a 1982 OTA followup survey, officials from about two-thirds of the States indicated a clear preference for the III concept, with officials from most of the other States either actively considering III or seeking further information on which to base a decision. However, many States, even some of those strongly supporting III, noted a variety of implementation problems which might preclude their participation, in some cases for years.

Many of these officials also support the concept of a National Fingerprint File (NFF), considered to be an integral part of III. The NFF would be limited to fingerprint cards and related personal descriptors on each criminal offender. The NFF would contain no arrest or disposition data. It would perform the technical fingerprint search to establish positive identification or nonidentification based on fingerprint cards received from State identification bureaus or Federal agencies.

It would aslo assign FBI identification numbers, and could enter identification data into III. The NFF concept is predicated on single-source submission policies. That is, only one agency per State would be authorized to submit fingerprint cards. Submission of only one fingerprint card per subject per State would be permitted.

OTA surveyed the States with respect to single-source fingerprint card submission and found that, as of August 1982, 18 States had implemented single-source submission (compared with 17 in a September 1981 FBI survey) and four more had scheduled a late 1982 implementation, for a total of 22 States. Officials from about one-third of the other States indicated that implementing single-source submission could be difficult due to a potential work overload, staff and funding shortages, local agency resistance, and/or privacy concerns.

Possible Impacts of a National CCH System

Criminal Justice Process.—To the extent that a national CCH system provides information that is more complete, timely, and verifiable (based on positive identification) than is presently available, the system would improve the functioning of the criminal justice process. The most significant improvements are likely to be in the areas of criminal investigations, police booking and intake, pretrial release and bail decisions, and presentence investigation reports.

For example, after an arrest, police make or participate in decisions concerning whether to release or how long to hold the suspect, whether to fingerprint, and the level of charges to be placed. Each of these decisions clearly affects the creation of a criminal history record, and conversely, criminal history records (and thus a national CCH system) may potentially influence these decisions. Since postarrest police decisions often must be made quickly, a national CCH system could make criminal history records more readily available, thus increasing their use.

The impact of a national CCH system could be particularly significant in pretrial release and bail decisions, which typically must be made within 36 to 72 hours after arrest. If accurate and complete, CCH records could help prosecutors and judges to better balance the need to protect the public from harm by defendants out on bail, versus the need to protect the constitutional rights of defendants. Many States have laws or rules requiring judges to consider prior convictions in determining pretrial release conditions. It is important, however, that CCH records be complete and accurate. In *Tatum* v. *Rogers* (1979), a U.S. district court found a violation of constitutional (sixth, eighth, and 14th amendment) rights when arrest information without otherwise available disposition information was used in setting bail.

Criminal history information is also used in the preparation of presentence investigation reports. These are used by judges in arriving

at a sentence suited to offenders, and are subsequently used by the courts and corrections departments in assigning offenders to appropriate institutions. Problems that arise in the preparation of presentencing reports include incomplete disposition data and insufficient resources (time and money) for verification. It would appear that a national CCH system would be advantageous if based on accurate and complete records that could be obtained quickly and easily.

A national CCH system could also affect other aspects of the criminal justice process. For example, criminal history records are very important to specialized programs (e.g., prior felon, career crime, and violent felon programs) that assign police investigators and special prosecutors to individuals who have prior felony convictions. Also, an arrestee's criminal history record can affect the prosecutor's decisions concerning whether to bring or drop charges, the level and number of charges, and whether to negotiate at trial for lower charges through plea bargaining. An offender's criminal history is also an important factor in determining initial correctional custody rating (level of supervision needed) and institutional placement (e.g., maximum, medium, or minimum security), and is one of many factors considered in parole decisions.

Employment and Licensure.—Criminal history information is used in employment and licensing decisions to protect the public or the employer from harm. Criminal records may be used to screen individuals out of positions where they might easily cause harm to other citizens or coworkers or present an excessive risk to the protection of valuable assets (e.g., money, securities, precious jewelry, and other property).

However, limiting job opportunities on the basis of a criminal record in effect involves an additional punishment for crime, that is, a "civil disability," in addition to the punishment administered by the court. This civil disability may in turn hinder the rehabilitation of offenders and prevent them from becoming useful and productive members of society, even if they want to do so and are otherwise capable. Former offenders who cannot find suitable employment may become dependent on public welfare or return to crime.

Federal and State legislatures must balance these considerations when requiring criminal history checks or character evaluations (which frequently include record checks) for literally millions of public sector jobs or publicly licensed private sector jobs. The private sector also frequently seeks criminal history information in making employment decisions.

The impact of a national CCH system for noncriminal justice use is complicated by several factors. First, States (as well as the Federal Government) vary widely in their noncriminal justice access and dissemination policies. As noted earlier, a significant portion of State and

Federal criminal history record repository use is for noncriminal justice purposes.

Second, noncriminal justice use is even more sensitive to record quality than is criminal justice use. There is no doubt that the use of criminal history information affects employment and licensing decisions. The results of research, case studies of employers, surveys of employer attitudes, as well as the experience of Federal and State parole officers, all suggest that any formal contact between an individual and the criminal justice process is likely to influence an employer's decisions on job applicants. A record of arrest and conviction will have the greatest influence, but even a record of arrest and acquittal will frequently work to the disadvantage of the applicant. This problem is aggravated because criminal history records are designed for use by those who are familiar with the criminal justice process and who understand the limitations of a record.

Third, there is considerable disagreement over the extent to which criminal history records can predict future employment behavior, except in particular cases such as repeat violent offenders. Other factors such as education, prior work experience, length of time in the community, and personal references may be more predictive. On the other hand, the high recidivism rates suggest that once a person is arrested or convicted, he or she is much more likely to be convicted of a subsequent crime within a few years than those without a prior criminal record. Whether or not this is relevant to or predictive of employment behavior is a matter of debate. States such as New York have required by statute that any agency seeking criminal history information establish a strong relationship between the nature of the job and specific kinds of criminal offenses. Florida, with its open records policy, is at the other extreme.

Fourth, criminal history records involve a sizable proportion of all persons in the labor force. After a careful review of existing research, OTA estimated that as of 1979 about 36 million living U.S. citizens had criminal history records held by Federal, State, and/or local repositories.

These aspects of noncriminal justice use warrant congressional consideration in formulating policy on any national CCH system.

Minority Groups.—Some minority groups account for a disproportionate percentage of arrest records. For example, various studies have estimated the percentage of blacks with arrest records as ranging from 30 percent nationwide to over 50 percent in certain cities such as Philadelphia. As of February 21, 1980, blacks accounted for about 29 percent of all records in the NCIC/CCH file, which is almost triple the percentage of blacks in the total U.S. population.

As discussed earlier, a criminal arrest record, even without convictions, can have an adverse effect on employment and licensing applicants. Indeed, the courts have found that a policy of refusing employ-

ment to blacks with an arrest record without convictions "had a racially discriminatory impact because blacks are arrested substantially more frequently than whites in proportion to their numbers" (see *Gregory* v. *Litton Systems*, 1970). Similar judicial reasoning has been extended to black applicants refused employment due to criminal convictions where the offense "does not significantly bear upon the particular job requirements" (see *Green* v. *Missouri Pacific RR*, 1975).

In this context, any discriminatory impacts from the use of national CCH information would depend on whether and under what conditions noncriminal justice access is permitted. The potential for discriminatory impacts could be minimized if records or index entries based on arrest-only information, as well as information on arrests not leading to conviction, were actively sealed or otherwise effectively removed from the file, at least for noncriminal justice purposes. Some States, such as New York, do this for their own files, but many States do not. California has struck a middle ground. Felony arrests that result in detention only are retained in the California State criminal history record repository for 5 years, and felony arrests that otherwise do not result in a conviction are retained for 7 years.

Federalism.—The balance of authority and power between Federal, State, and local governments has been a central issue in the debate over a national CCH system. Because of the decentralized nature of the U.S. criminal justice process and because the generation and use of criminal history information occurs mostly at the State and local levels of government, most States seek a primary role in any national CCH system. State governments have basic jurisdiction over law enforcement and criminal justice within their borders under their constitutionally reserved powers, and many have been reluctant to share this jurisdiction with the Federal Government, except with respect to Federal offenders. Most States have appreciated other kinds of support from the Federal Government, such as FBI fingerprint identification services and LEAA funding for State CCH system development, as long as this support was provided on a voluntary basis and the States retained control over the operation and use of their own criminal history record systems.

The Federal Government has a legitimate interest in: 1) the enforcement of Federal criminal law, 2) the prosecution of Federal offenders, whether intrastate or interstate, and 3) assisting with the apprehension of interstate and international criminal offenders who cross State and/or national borders. To the extent that crime is perceived as a national problem deserving national attention, the Federal Government also has a defined role in the provision of voluntary support to State and local law enforcement and criminal justice activities.

From the perspective of many States, a national CCH system like III would have a minimal impact on Federal-State relationships assuming that it retained State policy control over the CCH records, avoided any significant conflict with State laws and practices on the

collection and use of criminal history information, and kept State costs at an affordable level. Nevertheless, III (or any other national CCH system) would have interstate and national as well as intrastate impacts. A strong argument can be made that, regardless of the specific system structure, the Federal Government has the responsibility and authority to establish some kind of system standards.

From a legal standpoint, Federal action could be based on: 1) the criminal record information needs of Federal agencies as established by various Federal statutes and Executive orders (e.g., Executive Order Nos. 10450, 12065, and 10865); 2) the implementation of Federal regulations for State and local criminal justice information systems that have used Federal funding (title 28, Code of Federal Regulations, pt. 20); 3) the interstate commerce clause of the U.S. Constitution; and/or 4) the constitutional provisions (including the first, fourth, fifth, sixth, ninth, and 14th amendments) guaranteeing individual rights of privacy and due process.

Cost.—Throughout the 1970's, it was Federal Government policy to support the development of State CCH systems and the implementation of the Federal regulations. From 1970 to 1981, LEAA provided a cumulative total of about $207 million in categorical grants to the States for comprehensive data systems and statistical programs. About $39 million was for 145 CCH-related grants awarded to 35 different States. These grants peaked in 1976 and ended in 1981.

Thus, at present the States and localities would have to bear most of the cost of any national CCH system. The difficulty of finding "new money" or cutting back other expenses could discourage State participation. Financing could be particularly difficult for States whose criminal history record systems are not yet well developed, whose need for a national CCH system is not perceived to be great, and whose ability to pay is limited.

OTA did not independently estimate the cost of a national CCH system. The Federal share would presumably include some portion of the cost of Ident (which totaled about $58.7 million in fiscal year 1980 and whose full automation has been estimated at $50 million by JPL) and NCIC ($6.1 million in fiscal year 1981), plus the costs of Federal agencies participating in the system. The actual Federal share would depend on the specific alternative implemented, and whether or not further Federal support were provided to the States.

LEAA grants made a significant contribution to the relatively rapid development of State CCH systems during the last 12 years. OTA research has identified the following three areas as possible priorities for further funding: 1) improving court disposition reporting systems on a nationwide basis; 2) upgrading criminal history record systems in the States that are operating manually or assisting those in the process of automating their name index and/or file; and 3) improving procedures in all States where necessary to assure the accuracy and

completeness of criminal history information, to conduct audits of local users, to maintain and periodically review transaction logs, and to train employees and users.

Surveillance Potential.—The "flagging" of criminal records is a common monitoring or surveillance practice and an accepted law enforcement tool. Placing a flag on a file helps law enforcement personnel to keep track of the location and activity of a suspect whenever there is a police contact.

Concern has been expressed about the possible use of a national CCH system by Federal agencies—and particularly the FBI—for monitoring or surveillance of the lawful activities of individuals or organizations. To understand this concern, one must remember that the debate over a national CCH system began in the late 1960's and early 1970's, a time when the FBI was engaged in domestic political intelligence and surveillance activities with respect to, for example, civil rights and anti-Vietnam War leaders and groups. Also during the early 1970's, the FBI made very limited use of NCIC for intelligence purposes which, although strictly law enforcement in nature, had not been authorized by Congress.

Since that time, the FBI has rejected all requests or proposals for intelligence use of NCIC.* During the course of the OTA study, FBI officials have repeatedly stated to Congress and to OTA that they will not permit Ident or NCIC to be used for unauthorized purposes of any kind. FBI officials do not believe that a national CCH would have any significant surveillance potential and would represent little, if any, danger to law-abiding citizens. Strong and independent policy control over a national CCH system and tight restrictions on noncriminal justice access, coupled with outside audit and explicit statutory guidelines for operations, would help protect against the possibility—however remote —that a national CCH system could be used at some point in the future in violation of first amendment or other constitutional rights. In comments to OTA, various criminal justice officials have suggested a statutory prohibition on intelligence use of III or any other national CCH system. On the other hand, some State officials have noted that there may be legitimate intelligence and surveillance applications, and that these possibilities should not be abandoned solely because of their sensitivity.

Message Switching.—As noted earlier, unless all criminal history records were stored in one place (e.g., a national CCH repository) a national CCH system would require some electronic means to transfer records (and inquiries for such records) among and between the various State and Federal repositories and participating agencies. The

*As of September 1982, the Department of Justice and the FBI had approved but not yet implemented a U.S. Secret Service proposal to establish an NCIC file on persons judged to represent a potential threat to protectees, including the President. This could involve the use of NCIC to gather intelligence data on or track individuals not formally charged with a criminal offense.

transfer or switching of messages from one State to another through the NCIC computer has been a point of controversy over the last 12 years. Some message switching alternatives have raised questions about the impact on Federal-State relations and the potential for monitoring and surveillance. For example, in 1973, the FBI proposed to have NCIC assume all law enforcement message switching (not just NCIC/CCH traffic), including messages sent over NLETS. As a result, Congress has denied the FBI authority to perform message switching, defined as "the technique of receiving a message, storing it in a computer until the proper line is available, and then retransmitting, with no direct connection between the incoming and outgoing lines."* More specifically, the Department of Justice (DOJ) was prohibited, without explicit approval of the House and Senate Judiciary Committees of Congress, from "utilizing equipment to create a message switching system linking State and local law enforcement data banks through equipment under the control of DOJ or the FBI."** In addition, congressional approvals in 1979 and 1980 of the FBI's requests to upgrade NCIC computer technology were conditioned on the FBI's commitment not to use such technology for message switching.

There are several message switching alternatives for III. First, inquiries could be switched via NCIC, with records returned via the NLETS message switching system. This approach was used in the III pilot and Phase 1 tests. The routing of inquiries through NCIC has been termed "automatic inquiry referral" and is a form of partial message switching. Second, both inquiries and records could be switched via NCIC. Third, both inquiries and records could be switched via NLETS. Fourth, records could be switched via NLETS and inquiries via NCIC or NLETS. Fifth, the use of NCIC or NLETS could be optional for switching of both inquiries and records. OTA has not evaluated these alternatives in detail, although all appear to be technically feasible. In making a complete evaluation, message formats and purpose codes, costs to the States and the Federal Government, response time, and message privacy and security all need to be considered. In any event, any DOJ or FBI message switching role in a fully operational III (or other national CCH system) would probably require congressional approval.

Congressional Policy Considerations

As noted earlier, the emerging consensus among Federal and State law enforcement and criminal history record repository officials supports the national index concept known as III. However, full implementation of III (or any other national CCH system) raises a number

*Department of Justice Appropriation Authorization Act of 1980.
**Ibid.

of issues that warrant congressional attention to ensure that beneficial impacts are maximized and adverse impacts are controlled or minimized.

Policy Control.—Considerable debate has focused on which agency or organization should have direct policy control over a national CCH system. Suggestions include a consortium of States, a broadened and strengthened NCIC's Advisory Policy Board, an independent board, and/or the FBI. For example, a broadened and strengthened Advisory Policy Board could include greater representation from the prosecutorial, judicial, correctional, and public defender sectors of the criminal justice community than at present, and could include an "advise and consent" role, at least with respect to State and local participation in a national system. There are many other possibilities, but the key issue is how to devise a mechanism that will effectively represent the interests of the diverse users of a national system, and afford them a strong and possibly controlling policy role.

File Size and Content.—Under the III concept, the national index would include only names and identifying information (e.g., height, weight, social security number, and State and Federal criminal identification numbers). Proposals have been made to limit the index to entries on violent or very serious offenders, that is, for crimes included in the FBI Crime Index. However, this would exclude entries for drug, weapons, drunk driving, and other offenses generally considered to be serious but not included in the FBI Crime Index. At the other extreme, a totally unrestricted index could include entries on as many as 36 million persons. Other national index issues include the need for policies on limited retention periods for some entries and on the handling of juvenile offender records.

Record Quality.—With a national index, the FBI would no longer maintain non-Federal records, and the problems of record quality in Ident and NCIC/CCH would be reduced. However, the quality of records maintained by the States, as well as the quality of any index based on those records, would still be a matter of concern. Record quality could be strengthened by tightening the disposition reporting requirements and/or requiring confirmation of records lacking disposition data with the originating agency prior to any dissemination. In the opinion of some, the latter requirement would be costly and impractical. The progress made by many States in recent years indicates that improved disposition reporting is possible, but continued improvement would require a significant further commitment measured in manpower, dollars, and system improvements at the State and local levels.

Noncriminal Justice Access.—Significant noncriminal justice use of Federal and State criminal history record systems, coupled with widely varying State statutes defining authorized users and State policies on sealing and purging, has generated concern about control of access to criminal history records. Noncriminal justice access to

a national index could be prohibited, although this would conflict with many Federal and State laws. Noncriminal justice access could be permitted, but only under stronger Federal guidelines than presently exist. A dual index could be established, one for criminal justice use and a second for noncriminal justice use, perhaps with the latter based on disposition or conviction information only. Even under the status quo, access to a national index would require complicated safeguards (which are technically feasible with a computer-based system) to be consistent with the wide variety of existing State laws and regulations, and would require some means to resolve conflicts between State laws, and between Federal statutes and Executive orders and State laws.

Oversight and Audit.—The purposes of new oversight mechanisms would be to help assure Congress, the public, and others that a national index (or any other national CCH system) is operating within the boundaries of law and regulation, and to help identify any problems that may emerge. Oversight is closely linked to system audit. Several possibilities have been suggested. First, Congress could require an annual management report on the operation of a national CCH system. Second, Congress could require periodic audits of Federal and State CCH files to help ensure compliance with whatever system standards may be established. To keep costs down, the audits would presumably be conducted by sampling Federal and State files on a rotating and perhaps unannounced schedule. Any Federal audit authority, whether by GAO or some other body, would appear to require new Federal legislation and/or regulations.

Public Participation.—NCIC's APB is the only direct avenue of public participation in the governance of the existing NCIC/CCH system. However, at present APB does not include representation from the general public or from public defenders. Public defenders feel strongly that they should be represented on any policy board established for a national CCH system and that defense interests should have access to that system. The experience of Alameda County, Calif., where public defenders are considered to be part of the criminal justice community, has been that public participation in oversight can help ensure accountability of criminal justice record systems and can be beneficial in terms of system performance.

Comprehensive Legislation.—Legislation represents one of the strongest measures to provide Federal direction and ensure accountability and control. It could provide explicit authority for a national index or other national CCH system, and include statutory guidelines for its operation and use. In addition to the areas listed above, legislation could establish access, review, and challenge procedures; criminal penalties; privacy standards; funding for computer-based user audits and disposition monitoring procedures; and uniform crime codes and criminal history record formats. Legislation could also cover areas discussed earlier such as intelligence use, message switching, and fund-

ing for development of court disposition reporting and State criminal history record systems.

III Development Plan.—In order to develop important additional data from the III test now under way, Congress may wish to consider whether the plan should be revised so that: 1) some or all of the participating States can be tested with no NCIC message switching as well as with partial message switching (known as automatic inquiry referral); and 2) record quality research can be conducted.

AIDS/CCH Consolidation.—At present, the Ident/AIDS and NCIC/CCH files duplicate each other to a significant and growing extent. Any AIDS/CCH consolidation is likely to have a significant impact on the cost of FBI criminal history and identification services and could be an integral part of a national CCH system. Congress may wish to request the preparation of several alternative consolidation plans, including the possible creation of a new National Criminal Information and Identification Division of the FBI which would combine Ident, NCIC, and related activities. Congress may also wish to examine the pros and cons of shifting management of a national CCH system to a new bureau within DOJ or elsewhere.

NOTE: Copies of the full report "An Assessment of Alternatives for a National Computerized Criminal History System," can be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, GPO stock No. 052-003-00896-3.

Assessments in Progress as of October 1982

Alternative Energy Futures
Industrial and Commercial Cogeneration
Strategic Responses to an Extended Oil Disruption
Potential U.S. Natural Gas Availability
The Future of Conventional Nuclear Power
An Assessment of Nonnuclear Industrial Hazardous Waste
Wood: The Material, The Resource
Technologies To Reduce U.S. Materials Import Vulnerability
Impact of Technology on Competitiveness of U.S. Electronics Industry
Strategic Command, Control, Communications, and Intelligence Systems
Technology Transfer to the Middle East
Water-Related Technologies for Sustaining Agriculture in U.S. Arid and Semiarid Lands
Technologies To Sustain Tropical Forest Resources
Plants: The Potentials for Extracting Protein, Medicines, and Other Useful Chemicals
Evaluation of Veterans Administration Agent Orange Protocol
Health and Safety Control Technologies in the Workplace
Medical Technology and Costs of the Medicare Program
The Medical Devices Industry
Comparative Assessment of the Commercial Development of Biotechnology
Genetic Screening and Cytogenetic Surveillance in the Workplace
Impact of Technology on Aging in America
The Patent System and Its Impact on New Technological Enterprises
Information Technology on Aging in America
Impacts of Atmospheric Alterations
Assessment of Approaches to Wetlands Use
Airport System Development
Impact of Clinical Trials on Medical Practice and Health Policy
Technical Information for Regulatory Decisionmaking About New Chemicals

General Information

Information on the operation of OTA, the nature and status of ongoing assessments, or a list of available publications may be obtained by writing or calling:

Office of Congressional and Public Communications
Office of Technology Assessment
U.S. Congress
Washington, D.C. 20510
(202) 226-2115

Publications Available

OTA Annual Report.—Details OTA's activities and summarizes reports published during the preceding year.

List of Publications.—Catalogs by subject area all of OTA's published reports with instructions on how to order them.

Press Releases.—Announces publication of reports, staff appointments, and other newsworthy activities.

OTA Brochure.—"What OTA Is, What OTA Does, How OTA Works."

Assessment Activities.—Contains brief descriptions of assessments presently under way and recently published reports.

Contacts Within OTA

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Mr. WOOD. Thank you very much.

I would like to emphasize the major findings of our study. First of all, we concluded that the United States already has a national criminal history system.

As Dr. Andelin mentioned, 27 of the States have computerized criminal history files, as does the Federal Government, at least partially. There are over 60 million criminal records at the State and Federal levels, and approximately one-third are computerized right now. So the issue is not whether to have a national system; the issue is whether the current system that we have now is working well enough.

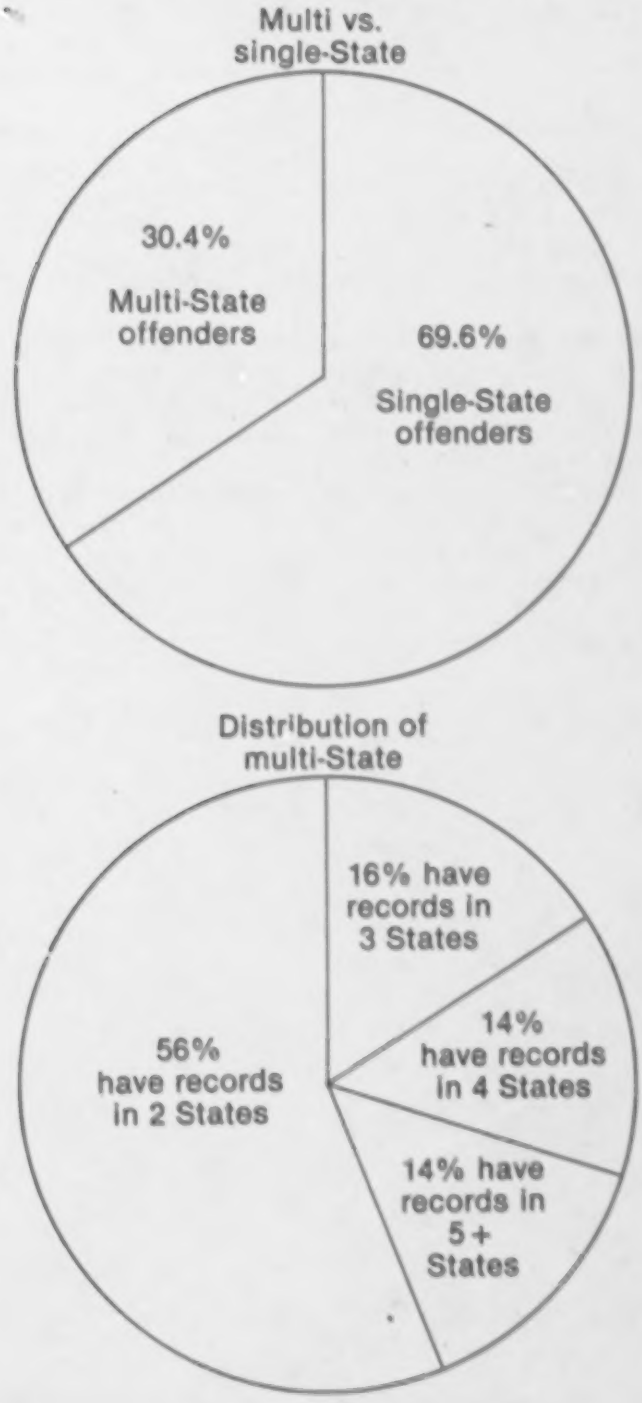
After looking at this entire area, OTA reached a conclusion that the current system, while showing significant improvement over the last decade, is still not fully meeting legitimate criminal justice needs, nor is it fully protecting privacy and individual rights. We still have considerable progress to make to have a system that meets both criminal justice needs and the need to protect privacy and individual rights.

There were several problems that OTA identified with respect to the current system. One is a slow response time for getting records of multi-State offenders. I would like to call your attention to chart No. 3, which illustrates our findings in that regard.

[Chart 3 follows:]

Chart 3

Multi-State Offenders



NOTE: About 75 percent of Multi-State offenders have arrests in at least one noncontiguous State.
SOURCE: Office of Technology Assessment sample of FBI Ident file, 1979.

Mr. WOOD. We did confirm the significant percentage of multi-State offenders. In fact, we found that 30.4 percent of serious offenders have records in more than one State. But even more importantly, many of those offenders have records in three, four, five or more States, and additionally, we found that 75 percent of the multi-State offenders have records in at least one noncontiguous State.

So we did determine that in fact there is significant interstate mobility, and that there is a need for interstate exchange of criminal history records. The problem is that as it stands now, it is very difficult to get that information on a timely and complete basis, in a way that will meet the needs of the various components of the criminal justice system that you identified in your opening statement.

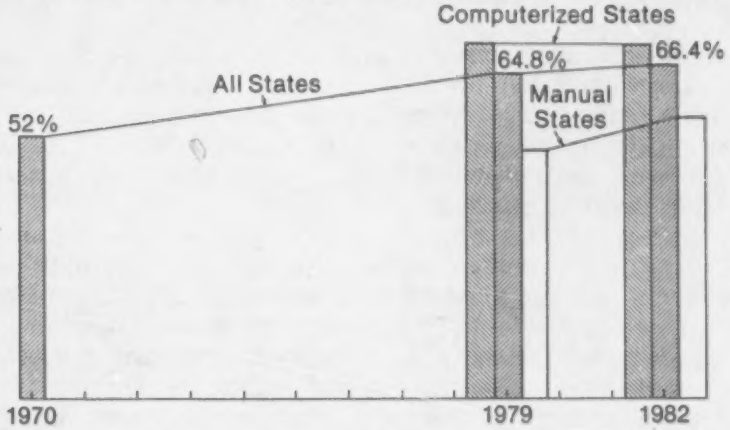
A second problem is record duplication. As it stands right now, there are millions of records that are maintained both at the State and Federal level. This is a problem that is, hopefully, going to be addressed by the Interstate Identification System, which I will mention a little bit later.

A third problem area which we think is perhaps the most important is record quality. I would like to call your attention to chart No. 4, which outlines some of our findings on record quality. The No. 1 problem within record quality is incomplete disposition reporting.

[Chart 4 follows:]

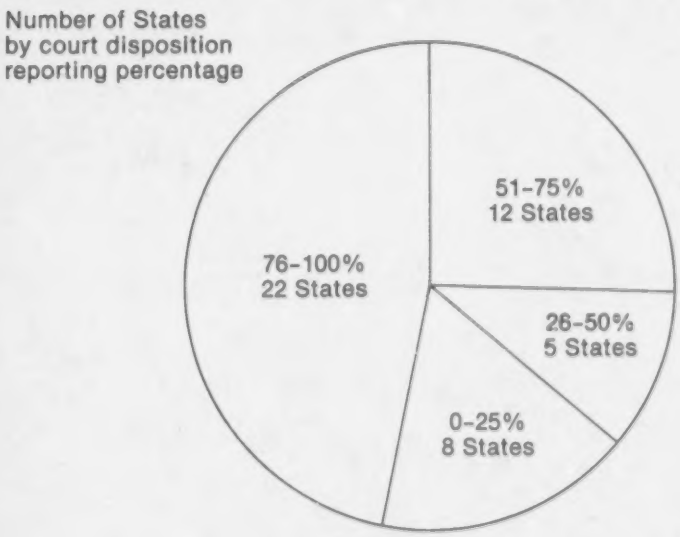
Chart 4.

Court Disposition Reporting, 1970, 1979, and 1982



SOURCE: GAO, LEAA, and Office of Technology Assessment.

Court Disposition Reporting, All States, 1982



SOURCE: Office of Technology Assessment, 1982.

Mr. WOOD. We conducted surveys of the States in 1979 and 1982. We also did sampling of the FBI's criminal record files. The results show, without a doubt, that about one-third of the dispositions that are taking place are not being reported to State and Federal repositories.

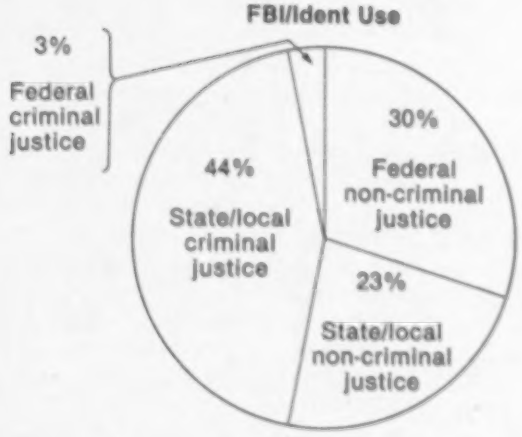
Now, as you can see from the chart, there has been some improvement since 1970, but over the last several years there really has been very little improvement in the overal national average, although surprisingly we found that the manual States have come up a bit. However, computerized States still do better on disposition reporting than manual States.

Another aspect of the record quality problem is incomplete record updating. As a person passes through the criminal justice process, different actions are taken, different information is generated. This information is not getting into the record anywhere near as much as it should. Record quality problems can compromise both public safety and constitutional and individual rights.

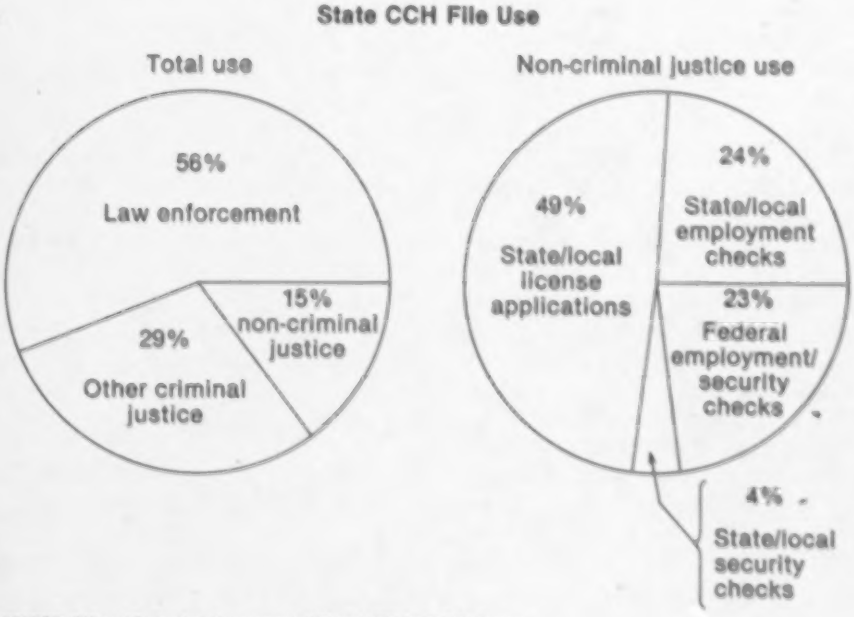
A fourth problem area is the substantial employment and licensure use, and I call your attention to chart No. 5. We found, based on our surveys at the State and Federal levels that in fiscal year 1981, roughly one-half of the use of the FBI's Identification Division was for employment and licensing purposes, and roughly one-fifth of use at the State level.

[Chart 5 follows:]

Chart 5. **Criminal History Record Use**



SOURCE: FBI, 1981 (6.8 million fingerprint cards received by Ident).



SOURCE: Office of Technology Assessment, 1979 and 1982 (for 27 CCH States).

Mr. WOOD. The question then, what does this mean for Congress, and what should Congress do? We feel that it is important that Congress seriously consider action in four priority areas.

No. 1, record quality. We feel that there is a need to carefully examine tightening the record quality standards, because a national system will critically depend on the quality of the records for its success.

No. 2, noncriminal justice access. It seems essential that there be a Federal resolution of the existing conflicts amongst the many State laws on employment and licensing access and, particularly, on the use of nonconviction information, and the dissemination of that information for noncriminal justice purposes.

No. 3, in terms of priority action, is policy control. We feel that it is very important that a policy advisory mechanism involve all sectors of the criminal justice community.

And finally, record content. As it stands now, there is wide disparity among the States, and congressional action is certainly in order to rectify that so that there is consistency and uniformity in the records that are exchanged.

Mr. Chairman, I thank you. I would be happy to answer any questions that you might have.

Senator MATHIAS. Let me ask you first this question.

How long was this assessment in the making?

Mr. WOOD. This study ran approximately 4 to 5 years.

Senator MATHIAS. It goes back as far as I can recall, to about 1978, is that roughly correct?

Mr. WOOD. That is correct.

Senator MATHIAS. Now, in the 5 years since 1978, there has been a substantial amount of technological progress in the computer area.

Was there any monitoring of this technological advance, as you went along?

Mr. WOOD. Yes, as a matter of fact, one of the realities that we had to face with the study was that the real world was changing, and in fact we had to update the study two or three times, so that it would reflect reality.

The technology has come a long way, and many States are using it, and we had to deal with that.

Senator MATHIAS. And when was the assessment first published?

Mr. WOOD. The assessment report was published in October of 1982.

Senator MATHIAS. So there has been 6 months, or a little more, to get public reaction?

Mr. WOOD. That is correct.

Senator MATHIAS. If you had it to do over again, would you change anything as a result of this public reaction?

Mr. WOOD. Well, frankly, the public reaction to the report has been very favorable. We have had a substantial amount of press coverage in the New York Times, San Francisco Chronicle, St. Louis Post-Dispatch, and elsewhere, and the newspapers generally feel it is a very important national issue.

Senator MATHIAS. One thing that might be helpful, because I think it will come up throughout the afternoon, is a discussion of the interstate identification index.

Do you want to say anything further about that?

Mr. WOOD. Sure, I will be happy to. We did look at a range of alternatives in our study, all the way from a full record national repository, where all records would be computerized in one national data bank, to the other extreme, where there would be basically no national system, and it would be like a telephone party line, everybody would call everybody else.

The index is a balancing act that provides a central focus, an index of offenders, but at the same time permits the records themselves to be maintained by the States or the Federal Government, respectively. It is technically feasible, in our opinion; it does use, or could use, or should use new computer and communication technology, and it can potentially provide faster record access and quicker dissemination.

But on the other hand, it will not, in and of itself, solve the record quality problems; it will not, in and of itself, solve the problems with noncriminal justice access.

Senator MATHIAS. So that is one of the reasons for your recommendation that we need further quality control?

Mr. WOOD. That is correct. We found significant record quality problems at the FBI level, as well as at the State level.

Now, the interstate identification index will solve some of the FBI record quality problems, but it will not automatically improve record quality at the State level.

Senator MATHIAS. Now, as I understand it, there has been no access to the interstate identification index by noncriminal justice use, is that correct?

Mr. WOOD. Up to this moment, that is correct. Yes. And that is a major issue that is going to have to be addressed.

Senator MATHIAS. Why not continue that policy?

Mr. WOOD. Because if the III becomes the national system that is adopted and implemented, and if noncriminal justice requests are not permitted to use that index, that will require the FBI, or somebody else, to maintain a separate file for employment and licensing purposes. This would defeat one of the major objectives of the III in the first place, which is to get away from a national full record repository.

Senator MATHIAS. Now, you talk about resolving conflicts in State law. Very delicate job, particularly in the view of the chairman of the full committee, who has a high regard for State law.

How do you propose to resolve that conflict?

Mr. WOOD. We believe that while there are differences, obviously, among State laws on these subjects, there are some commonalities. There is some common ground, and we would suggest looking for some minimum national standards that can be reasonably met and be reasonably consistent with most of the State laws. It is obviously going to be impossible to have an approach that will be consistent with every State law, but we think minimum national standards are possible, because very significantly, almost every State now has made some progress in establishing their own State criminal record privacy laws.

This is a radical change from the early seventies, when very few States had their own laws.

Senator MATHIAS. Well, you have given this committee and the Congress an assignment that will keep us busy for a while.

I just promise you that when we get to work on your assignment, we are going to have to call on you for further assistance.

So we thank you very much for being here today.

Mr. WOOD. Thank you.

[The following questions and answers were subsequently received for the record:]

FOLLOW-UP QUESTIONS AND ANSWERS

Question 1. As you graphically demonstrate in the report, the problem of record quality continues to plague the national criminal history records system, although there are some signs of improvement. You suggest that Congress ought to consider setting quality control standards. What do you think those standards should be? Is the goal of 100 percent disposition reporting realistic? If so, when should we require it to be attained?

Answer. Record quality is important for the efficiency of many law enforcement and criminal justice decisions that use or rely on criminal history records, as well as to the protection of individual and constitutional rights (especially including privacy, due process, and equal protection of the laws). Congress previously has recognized the importance of record quality in enacting Public Law 91-644 (Sec. 519(b)) and Public Law 93-83 (Sec. 524(b)) which emphasize the need for complete and accurate criminal history information. However, to date Congress has not set specific standards for record quality.

Should the Congress wish to establish record quality standards (perhaps concurrent with action on the Interstate Identification Index (III) concept), OTA has concluded that, at a minimum, the standards should incorporate several key provisions based in part on 28 CFR 20.21(a) and *Tarleton* v. *Saxbe* (1974, U.S. App. D.C.).

First, the standards should assign responsibility for State criminal history record quality to the State criminal record repositories, and responsibility for Federal record quality to the FBI. That is, the States and FBI would be legally responsible for maintaining complete and accurate records in their respective repositories. The quality of records exchanged via III will depend fundamentally on the record quality in the State and FBI repositories.

Second, the standards should establish mandatory disposition reporting requirements for all arrests entered into the III. That is, dispositions must be submitted to the State repository (or to the FBI for Federal offenders) for any arrests that are indexed in III. As of 1982, OTA estimates that about two-thirds of the States had statutes or formal agreements that mandate reporting of dispositions.

Third, the standards should set a mandatory disposition reporting period of, at a maximum, 90 days, which is the standard in 28 CFR 20.21(a)(1). While a majority of States are not in substantial compliance with the 90-day reporting requirement (e.g., 25 of 47 States surveyed by OTA in 1982 report that 25 percent or more of dispositions are never reported), no State official interviewed by OTA recommended relaxing the standard. Indeed, some support was expressed for tightening the disposition reporting period to 60 or even 30 days. Sixteen States surveyed by OTA indicated that dispositions are reported in 30 days or less. In Minnesota, roughly 80 percent of all final dispositions are reported within 1 to 2 days after the disposition occurs, and almost all are reported within 5 days.

Fourth, the standards should require that any record repository State or the Federal not in compliance on disposition reporting (as determined by audit) must check on the disposition status prior to dissemination of the record. This is similar to the check required by 28 CFR 20 (a)(1), except the disposition status check would take place only for States out of compliance, not for all disseminations by all States.

Fifth, the standards should establish mandatory routine record quality checks (the FBI and 35 of 46 States surveyed by OTA already do this) and a mandatory annual record quality audit. OTA found that, as of 1982, the FBI and 36 of 49 States surveyed had never conducted such an audit. Audits are essential as a means to compare the contents of State and local files to determine to what extent the State records are complete and accurate. In the event a State is unable to conduct such a record quality audit, the standards should give the authority (and perhaps funding) to the FBI or some other entity (e.g., the General Accounting Office or Advisory Policy Board or a new advisory group) to do the audit.

As to whether 100 percent disposition reporting is realistic, OTA found a few States that (by their own estimate) have already achieved this level. So it can apparently be done. Nonetheless, at present most States repositories (as well as the FBI) are missing dispositions for, on the average, about one-third of the arrests where a disposition actually occurred but was not reported. Of course, States with currently low disposition reporting rates (e.g., 13 of 47 States surveyed by OTA estimated 50 percent or less disposition reporting) cannot be expected to improve dramatically just because a reporting requirement is established. But rapid improvement is possible, as demonstrated by North Carolina, which increased disposition reporting from 26 percent to 61 percent over a 5- or 6-year period.

One approach would be for Congress to establish a goal of full and complete disposition reporting and direct the U.S. Department of Justice (perhaps in collaboration with the U.S. Supreme Court) to develop a realistic plan and schedule for each State (and the FBI) to achieve this goal. Congress could also provide funding to assist States in upgrading court information systems, establishing standardized court reporting procedures, improving the coordination between judicial and other criminal justice agencies responsible for timely update actions, strengthening field audits of reporting procedures and record quality, and other measures where needed to improve disposition reporting.

As a very rough approximation, OTA estimates that with a concerted effort, close to 100 percent disposition reporting for those arrests indexed in the III might be achieved on a nationwide basis within 5 years. OTA estimates that, of the 47 States responding to OTA's 1982 survey, 13 States might be able to achieve 100 percent reporting in 1 year or less, 9 States in 2 years, 12 States in 3 years, 5 States in 4 years, and 8 States in 5 years. These estimates are based on 1982 levels of disposition reporting, and apply only to arrests that would be both reportable to State repositories and indexed in the III. Thus most minor and many misdemeanor offenses presumably would be excluded.

Question 2. How does the continued evolution of information technology affect the matters raised in your report? Does the newest technology bring with it new dangers to privacy or to efficient administration of the criminal justice systems? Does it also provide new opportunities for curing some of the problems which you raise?

Answer. The continued evolution of information technology (e.g., faster, cheaper, smaller computers) is a two-edged sword. On the one hand, the technology permits much faster interstate (or, for that matter, intrastate and regional) exchange of criminal history information. If that information is complete and accurate, then criminal justice decisions that rely in any significant way on criminal history records would presumably be enhanced. On the other hand, if the information exchanged is incomplete or inaccurate, then criminal justice decisionmaking could be impaired to the detriment of public safety, the administration of justice, and individual rights.

The same dichotomy applies to the use of criminal history records for purposes other than criminal justice, such as employment and licensing decisions. Here the potential dangers to privacy result from the fact that incomplete and inaccurate information can be most harmful to the employment and rehabilitation prospects of individuals.

On balance, however, if used properly with adequate controls, oversight, and accountability, information and computer technology can contribute to better record quality. Especially for the larger States, computers are essential for managing the large volume of criminal history records and updates. With proper quality controls, computerized systems can achieve high levels of record quality and can facilitate the maintenance of transaction logs (to monitor use patterns and develop audit trails) and the implementation of internal and external quality checks.

But technology alone cannot solve all the problems of record quality. Fundamentally, high record quality requires high levels of cooperation between the law enforcement, prosecutorial, judicial, and correctional sectors. While information technology is an important tool, its proper use requires a cooperative working relationship within the criminal justice community. This is partly why the OTA study concluded that the policy advisory mechanism for the III should include substantial representation from all criminal justice sectors (as well as some users and stakeholders from outside the criminal justice community).

Finally, on the negative side, any national computerized system like the III has the potential for surveillance and monitoring of individuals or groups beyond those with prior criminal records or outstanding warrants. A direct tie-in or cross-indexing between the III and other NCIC files (e.g., wanted persons) is already under consideration. The Secret Service file recently established in NCIC illustrates how any category or group of individuals could be entered into the computer system and sub-

jected to nationwide surveillance and tracking. Regardless of the merits or demerits of the Secret Service file, OTA notes with considerable concern that such applications apparently do not at present require explicit statutory authority. The OTA study concluded that Federal legislation and strong accountability and oversight measures are the best mechanisms to ensure that the III and NCIC are not used at some future time for surveillance purposes lacking explicit authority in public law.

Question 3. Would technological advances be helpful to us in the area of noncriminal justice access? For example, isn't it possible to set up barriers to access which can be breached if a request is for a certain kind of information, for a certain purpose? For example, arrest records would not be generally available for employment inquiries; but records of arrest for certain specified offenses against children would be made available to authorized inquiries from schools or day care centers. How difficult would it be to devise such a partial access system?

Answer. Yes, computer technology would permit a system of partial access whereby certain kinds of requests for other than criminal justice purposes (e.g., employment and licensing) would be permitted access to specified categories of criminal history information. In fact, computers are frequently used today for similar applications in the private sector.

To implement such a system the rules of access via, say, the III would have to be agreed upon at the policy level by the States and the Federal Government. This agreement could be reached through user agreements or an interstate compact, but Federal legislation or regulations would be the most likely (and probably most expeditious) route.

Second, a set of access and offense codes would have to be developed and agreed to. NCIC already uses a very simple set of access (or purpose) codes. These would have to be expanded in order to distinguish between the types of requests that would have different levels of access to criminal history information. NCIC and the FBI's Uniform Crime Reports program both have offense codes which could be modified for use in the III.

Third, all of the participating States and the FBI would have to program their computers and records to use the agreed upon codes.

Apart from the difficulties in reaching agreement on rules for access for other than criminal justice purposes (i.e., noncriminal justice access), the cost of reprogramming computers and records could be substantial. In addition, some States (e.g., California) at present are of the opinion that there should be manual intervention (human review and processing) for such requests and that automated responses should not be permitted.

Overall, the partial access approach is more difficult to implement in a decentralized system like the III than in a centralized system. The reason is that, as presently envisioned, the III would not know the types of offenses included in the records requested or whether or not a disposition has occurred or how long it has been since the arrest. The index would contain only identification information and a listing of the State(s) holding a criminal history record on a specified individual. The index would contain no criminal history record information. Therefore, the record requests resulting in a hit against the index would have to be routed to the repository (or repositories) holding the record for a determination as to whether access is permitted to the information included in the record for the purpose stated. Special protections would be required to ensure that hit information was not disseminated if no record was releasable.

In sum, the technology is available to implement an automated partial access system. But the cost of automating a complex coding scheme is likely to be substantial, and some States may not view such information as either necessary or desirable. The higher priority would seem to be reaching a nationwide consensus on rules of noncriminal justice access via the III. This consensus could then be incorporated into statutory or regulatory language. Inquiries would be routed over III with the appropriate purpose code included, and States would respond in accordance with the agreed upon access rules. But whether or to what extent the State repository response was automated or manual would be left up to the States, at least for the time being.

Another alternative is, of course, to maintain a centralized criminal history file to respond to noncriminal justice requests. This would be much easier and less costly to program than 50 State files, but would defeat a major purpose of the III. As indicated by the few States (15) that have ever participated in the FBI's own computerized criminal history program, most States prefer the III concept where the records and responsibility for record quality and record dissemination remain at the State level.

An additional alternative would be for the FBI to serve as the record broker. Requests would be based on fingerprint cards or State or Federal identification number. If there was a hit on the III, the FBI would send inquiries to the States, assemble the record information received from the State, and provide the inquiring agency with only the information permitted under national standards. If no information was releasable, the FBI would respond, as they do now, in a way that does not indicate whether or not a record exists but only that there is no record meeting dissemination standards. This would put the FBI in a de facto full record message switching role for noncriminal justice requests.

Senator MATHIAS. Our next witnesses are composed of a panel, Mr. Kier T. Boyd, Deputy Assistant Director, the Federal Bureau of Investigation; Conrad S. Banner, and Mr. David F. Nemecek.

Gentlemen, happy to have you with us.

I did not explain to the last witnesses that these lights are not an obsession I have with Christmas, or anything of that sort. We try to hold you to our agreement that the statements will be limited to 10 minutes. When you are getting close, the yellow lights will flash, and then the red lights, but the full statement will be included in the record, of course.

STATEMENT OF KIER T. BOYD, DEPUTY ASSISTANT DIRECTOR, TECHNICAL SERVICES DIVISION, FEDERAL BUREAU OF INVESTIGATION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY CONRAD S. BANNER, DEPUTY ASSISTANT DIRECTOR FOR THE IDENTIFICATION DIVISION, AND DAVID F. NEMECEK, CHIEF, NATIONAL CRIME INFORMATION CENTER (NCIC) SECTION

Mr. BOYD. Good afternoon, Mr. Chairman.

On my left is Dave Nemecek, who is the chief of the NCIC section, and Bud Banner on my right, the Deputy Assistant Director for the Identification Division.

As you are probably aware, the Bureau has two criminal justice records systems; one, for positive identification, is in the fingerprint area, that is what Mr. Banner represents; each day approximately 25,000 fingerprint cards come in to the Bureau, where they are first searched with the name and identifying data of the information appearing on the card. If an indentification is not made, then the technical search is done.

Senator MATHIAS. Can I interrupt you just to ask, is the Fingerprint Division now fully operative?

Mr. BOYD. Fully operative, or fully automated?

Senator MATHIAS. Well, there was going to be a moratorium in which some reduced activity would——

Mr. BOYD. That is over.

Bud, do you want to address that?

Mr. BANNER. Yes, we had suspended employment and licensing types of searches during fiscal year 1982, and at the start of fiscal year 1983, those services were restored.

Senator MATHIAS. You are back to full activity now?

Mr. BANNER. Yes, sir.

Senator MATHIAS. All right.

Mr. BOYD. Mr. Chairman, turning to the automation efforts, the first attempt at having something instantly retrievable, beyond a name search, was back in 1971 with the computerized criminal history system. Several architectures were proposed. The one that eventually emerged was a centralized system where the Bureau

maintained not just the identifying data on an individual, but also his criminal record.

The system probably at its height had maybe 12 States participating, but it obviously was not what was needed. In 1978, the concept of the III was brought into existence. The first test with that was with the State of Florida. We subsequently enlarged that to other States who have been in the old CCH system; to date, we are just beginning—in fact, we began at the beginning of this month an expanded system where 15 States and the Federal Government will participate.

Under that concept, the FBI maintains both the identification information and the criminal record of Federal offenders. If an inquiry is made against the State offender, it goes against the index. The index points to a State which holds that record, sends a separate message to the State telling them that a request has been made and who is making it.

It also advises the inquiring State where the record is located. At that point, NCIC backs out of it and the State holding the record and the State which has made the inquiry get together generally through the inlets system. I guess we share the views that have been expressed both by you and the previous speaker on the matter of the quality and timeliness.

The Advisory Policy Board—and you will hear Mr. Wynbrandt speaking in a few minutes—has been very good in looking at what we can do to improve the quality of the data which is in the system.

One thing that we are starting, and Mr. Nemecek has just come back from it, is an onsite audit where the FBI will go down and work with the States to determine what can be done to improve quality of records.

Another area is what can be done to improve disposition reporting. We have looked at the sample States to find out, is there any commonality between what a State with good disposition reporting has and one which does not.

We find that there are common characteristics in the good systems. The first is the use of a multiple part form where the form can go with the person as he travels through the criminal justice system.

That form also has a number so that in the event the charge is charged, particularly through plea bargaining, this helps to follow it so that you are not trying to match a person's name and an offense charged and then later a name which may or may not be the same and a different charge under which a person has been convicted.

Also, another thing we found is mandatory disposition reporting time including followup. We, of course, do not have a national legislation about disposition reporting. We are in the NCIC section following up dispositions to make sure that as best we can the information does get back and into the system accurately.

These are a few of the initiatives that we have undertaken. We look forward to working with the committee and others in the hope to improve the III system as it goes from first its stage with just one State into the present 15 States, and we hope eventually to all States.

At this time I would be happy to respond to any questions of the chairman.

Senator MATHIAS. I would like to start by considering the rate of progress that goes on here. I just met at lunch with a group of lawyers, and we were talking about how the Constitution is going to look in the 21st century when computers do even more things than they can do today. What sort of constitutional questions will come up as a result of the use of computers?

With the advent of the microcomputer, more and more agencies have the capability of storing information, and it is certainly a lot easier to transmit information from one computer to another.

So that information gleaned from one authorized user of the new system, for example, a police headquarters, State police, could be instantly redisseminated to all of the local police around the State, obviously including a whole bunch of people who actually had no need to know in that particular case. It could be picked up and stored in sheriff's computers and may be there long after it has any relevance or value.

Could you outline the FBI's policy and how you plan to monitor NCIC users to insure compliance?

Mr. BOYD. All right. There are standards for the NCIC system as a whole which includes the first CCH and now the III file as to who is able to access it and the means by which they access it.

These are standards which are placed on the users and I mentioned a few minutes ago, we will perform audits to make sure they are working.

As far as the information getting to someone who——

Senator MATHIAS. There is no physical way to block them. You can audit and see who is observing, but there is no kind——

Mr. BOYD. You cannot block them. However, you can go back into the system and see, for instance, who has accessed a particular record; because on the NCIC system you have a log tape. Whoever inquires against that file, we have the identifier of the agency which has made that inquiry. We know when the inquiry was made, what the inquiry was, and what the answer is.

So you can go back and through a system of taking some of these, obviously, you cannot take all of them, but taking some of these, you can go back to determine if these were legitimate requests made of the system.

Senator MATHIAS. But then you would have to go to that user, that recipient, and determine what they did with the information, whether they simply stored it or whether they transmitted it further.

Mr. BOYD. You would have—you would know to whom it went, specifically what he did with it. I would say you're down now to the State level.

Dave, would you have any comments, working closer with the users than I do, as to their desire and capability to take it merely beyond the technical point of the information being placed at a user terminal?

Mr. NEMECEK. I believe I could make several comments in response to the chairman's question. One of the minimum standards for participation in the III test is that you would not store in and/

or disseminate information from your State data bases, so I think we can start with certain policies that are in existence.

Senator MATHIAS. It would be a policy violation at the outset if they did it?

Mr. NEMECEK. It will be a policy violation at the outset, yes.

With regard to being aware of unauthorized or possible unacceptable uses, I think a very good argument can be made for the fact that this increased technology provides opportunity to log and monitor utilization of the information.

On the one hand we talk in terms of increased efficiency and delivery of information, but we also have the ability to log all transactions that are made on the system; and, in fact, good data processing practices require that you make this accounting.

But this is really not something new regarding to NCIC's system because the logging of transactions has been in existence since the late sixties when we started up the first file.

We do have requirements down to the terminal level itself, that transactions must be logged including the name of the individual that is accessing the record and the purpose for which the record is being accessed.

There is also a requirement that there be logging at the State level. There is also logging at the national level. There are, of course, I think Mr. Boyd intimated, a number of edits and controls that can be effected through the system. He did talk about, in terms of blocking, and I think the answer to your question is you can block certain types of access. There is capability to control who can have access to the information.

Senator MATHIAS. Now, on auditing, would these be random audits, unannounced, without notice?

Mr. NEMECEK. Well, the actual procedures are being finalized now. We have carefully considered what is the Federal Government's legitimate role. Having followed the history of these discussions, you may recall that what authority or control the Federal Government has over the States was a very sensitive issue.

We have generally defined our role as an audit of compliance by the State control terminal agency itself which is responsible for certain NCIC policies and procedures within the State; and really is the focal point in State for NCIC matters.

We are also requiring as a part of the minimum standards for participating in the III, that these States also have very specific efficiency and effectiveness audits throughout the State.

We questioned whether it was our role in fact to go down to every area of the State itself and likely intrude into the State and local business. Nevertheless, to insure that our policies are being complied with, we will be looking for such things as, is there a data quality program established at the State level; are they in fact running a data quality program? There are a number of areas that we are looking into.

The most difficult part about that is, do you rely on the State agency's assurances, or do you select some agencies below the State control terminal level to audit and thereby validate compliance with that policy? I think the answer is that you probably have to cross into a semigray area. In the audit tests that we just complet-

ed, we actually went with the representative of the State to four agencies in the State, for a minimal compliance type look.

Neither resources nor legitimacy dictates that we go to the detail level that we do feel that the States should be looking at.

Senator MATHIAS. No. 1, do you have all the authority that you need for these audits? Is there anything that you want from the Congress by the way of additional authority?

Mr. NEMECEK. Mr. Chairman, at this point I would like to reserve the answer to that question for about 6 months until we get that first audit up. We have two additional tests that we are going to attempt. I do know that what we have found so far is that the element has made NCIC work for the last 17 years—cooperation by the State and local agencies with the FBI with very minimal authority over the States—is again the primary vehicle to obtain State and local consent for us to come into the State to audit.

We were welcomed as an opportunity for the State to find out how they were doing. I think as long as we are careful how much we intrude into the States, we are in pretty good shape.

Now, of course, there are 50 States. We have 50 different governments to approach. And we obviously selected some of the least troublesome States first. It could be that in the future, Senator, that you could be of some assistance. I am not sure.

Senator MATHIAS. I think the committee would be interested in hearing from you at any time.

Mr. NEMECEK. Yes, sir.

Senator MATHIAS. As you describe it, really, you say you depend on cooperation, but there is also that little hint of a sanction there.

Mr. NEMECEK. What we have designed, Mr. Chairman, is, absent statutory sanctions other than for prosecution of a Privacy Act violation for an unauthorized dissemination of information, for example, an audit report which will provide for communication of the audit information throughout the State, up to and including the Governor's level in the State for the appropriate review and oversight by that State.

Among the ideas being considered by the NCIC Advisory Policy Board's committees working on this particular project are a classifying of levels of participation among the States, up to and leading to termination of services or exclusions similar to the types of sanctions that we have had in the past.

Senator MATHIAS. It is a sobering prospect.

Mr. NEMECEK. Yes, sir. Theoretically, it is possible that there might be a State which at some time would say to the Federal Government, "You have no authority over us." I think our ultimate sanction will be, as it always has been, to terminate the service. But as you are aware, there are some criminal sanctions. There are a number of State and local laws which assist us in prosecuting violations. Frequently, the answer is in the State itself.

Senator MATHIAS. Now, your Advisory Policy Board has suggested that the FBI conduct a study of the problem of noncriminal justice access to the interstate identification index. How are you going to do that? Who are you going to talk to? Whose opinions are you going to seek?

Mr. NEMECEK. OK. That particular subject of noncriminal justice access has been reserved to these later stages of the III testing.

What we have recently done within the last month is award one consulting contract to an attorney who has substantial experience with regard to the Federal law itself.

We are in the process now of reviewing a proposal that has been presented to us by Search Group, Inc. In acknowledgment of their expertise over a number of years in the States with regard to State and local law, we would be looking to awarding a contract to them for a similar type study pertaining to State and local law.

Now, the objective of the study is not to tie ourselves to any preconceived, philosophical, or other type notions that have pervaded within the last 15 to 17 years. We are asking that all authority be collected regarding what is law and what is policy, be it at the State, Federal, or local level.

We then ask that an array of alternatives be generated with pros and cons and, as we have been doing in our interstate identification index test, we would then deliver that particular study data including alternatives to all of the various groups that have been conducting the review, including the NCIC Advisory Policy Board. All of this data, of course, has been provided to the congressional oversight committees. We have attempted and hope that through this approach which is different from our ill-fated experiences with the computerized history file, to develop facts and data to be present for review.

I think there are a number of personal feelings, at least for some of us that have been involved for a number of years, that many philosophical, or preconceived notions of use of criminal history records or other ideas or thoughts have been the basis for battles rather than a factual battle. I know the chairman acknowledged earlier in opening this group, that it is the facts that should be the basis for this determination.

We are hopeful that we can deliver these facts through this controlled III test. The study goal most certainly would be to develop the facts and present them for review by all the policy makers.

Senator MATHIAS. Let me move on to a kind of a philosophical question.

OTA concentrates a good deal of attention on record quality and content. Whether, for example, the arrest record ought to be available if the charge was dismissed finally.

The FBI wrote a letter to a resident of Maryland some time ago saying that arrest data should remain available to at least the criminal justice agencies and the Federal agencies conducting employment checks because restricting access to this data would deny those agencies "the preponderance of criminal history information relevant to the determination of individual character traits, reliability and trustworthiness."

The letter continues:

> Remember, an arrest record is only an indicator that the trained investigator utilizes to conduct his further investigation. If the further investigation shows that the person did not commit the crime with which he was charged, that ends the matter. On the other hand, if that further investigation indicates that, yes, he did this deed, this is reflective of his character.

Does this raise any question about the very deeply held principle of presumption of innocence?

Mr. BOYD. I believe there is still a presumption of innocence there. I think the letter reflects the law enforcement view, and those who grant such things as security clearances, that this information is something which is useful and should be checked into.

Here, of course, we are relying primarily on the process being able to resolve the issue: did the person in fact commit the crime, and we are relying on the judgment of people to look at that to the overall view of what the investigation shows.

I do not think that there are any black and white answers in here. I do think the view that is expressed in that letter is one that would represent by far the majority view of those people who do look into suitability questions.

Senator MATHIAS. Well—accepting that for the moment—as far as trained investigators are concerned, this committee, for example, asks the advice of the Federal Bureau of Investigation on all judicial candidates, and your investigators who make those personnel checks for us are trained investigators.

They know what leads to follow and what weight to give those leads. But what happens if and when noncriminal justice agencies have access to the records?

Where do we go then?

Mr. NEMECEK. If I might partially respond to that, Mr. Chairman. Up to this point on the NCIC system, we have not disseminated criminal history information directly to a noncriminal justice agency. There has been a theory, at least, that there is a different level of sophistication as far as the utilization of these records is concerned. I believe that that is the point that you are emphasizing.

I am not sure of the particular facts or circumstances in the letter that you mentioned, but I am not convinced that the criminal NCIC justice community that we deal with would advocate necessarily direct NCIC dissemination of information to the licensing bureaus at this point; you have a clearinghouse through criminal justice agencies, and I suspect that much of that could be accomplished through the criminal justice agency.

I think we have to acknowledge a different level of sophistication.

Senator MATHIAS. Well, that was really my point, that you have got two levels, at least two levels.

Mr. NEMECEK. Yes, sir, most certainly.

Senator MATHIAS. And I think the same is true with the FBI policy, which is not to disseminate arrest data that is more than 1 year old to noncriminal justice users—certainly if there is no disposition data. That is my understanding of the policy.

Mr. NEMECEK. Yes, sir, that is a policy that we implemented voluntarily, I believe in 1973. It was an acknowledgment—possibly a shifting of, if you want to say, a shifting of preponderance, at least. It is hard, I think, for the criminal justice community to not advocate the dissemination of arrest data when it is very current, say within the first couple of months. However, you will hear an argument that it should never be disseminated without the arrest or disposition data, but it has been repeatedly emphasized by the users of this information that to know that someone has been ar-

rested a month ago most certainly is a factor in licensing of employment decisions.

In establishing our policy we felt that after a year there was a certain balance that had to be struck, and we would just arbitrarily, quite frankly, not disseminate it without disposition data after that point.

Senator MATHIAS. OTA has suggested that your 1-year rule ought to be reduced to 6 months. What kind of problems would that then create?

Mr. NEMECEK. In our studies of our data bases, we find that the majority of disposition reporting occurs up to about 2 years. We find, although recently we have seen a speedy trial act enacted at the Federal level and in some States, we still find some rather protracted delays in final disposition actions occuring.

It gets very hard to say whether 6 months is better than 12 or 3 months is better than 6. I think at this point I probably would stand behind the current regulation that we have.

We most certainly, though, would welcome any legislation in this area that would clarify, at least for us, what is a legitimate time to not disseminate the information.

Senator MATHIAS. I knew we would get some work out of this before it was all over.

I think the same question applies to a charge that has been dismissed, at least as far as dissemination to noncriminal justice users.

Mr. NEMECEK. You could make a very good argument that if the charge is dismissed, that that is not relevant to a licensing employment decision. If you take that beyond to the criminal community utilization of the information, at that point I want to start making some strong arguments that either with or without disposition data, I believe that it most certainly is useful in many criminal justice processes. But as long as we are talking about licensing and employment, you could at least make that argument, and it does have some merit.

I might defer, though, to my other tablemates on that point.

Senator MATHIAS. Since they do not seem to disagree with you, we will go on.

The FBI has proposed a dangerous persons file in NCIC, in which you would identify, perhaps, several hundred people who, by virtue of one circumstance or another, might be considered as threats to public figures. Is that correct?

Mr. BOYD. Yes. The Secret Service file.

Senator MATHIAS. The Secret Service would then be notified of any inquiry from local law enforcement agencies about people who are in the dangerous persons file. NCIC would also notify the requesting officer that the subject is considered dangerous, as I understand the proposed procedure.

Are we getting into muddy waters on this one? Is it a useful or dangerous precedent to use a national computer network to monitor the movements of persons who are not suspected of crimes—in the sense that you could not really go before a judge and swear out a warrant for them?

Mr. BOYD. We looked at this request very carefully. It came to us, as I recall, in the fall of 1981. It came from Secret Service. This

was debated at some length by the Advisory Policy Board on two consecutive sessions.

We did have hearings over on the House side. We realized that we are in a new area; however, we do have caveats, both at the beginning of the message and at the end which we try to set this in perspective, that we are not saying that the person is a criminal; merely, this is somebody who in the best judgment of the Secret Service we should be aware of where they are.

I might add, the file did go into existence on April 27, and the one case so far has been successful.

Senator MATHIAS. Well, I am sympathetic with the goals that you are reaching for here. And I know it is a terribly difficult area, and we have too many tragic chapters in our national history not to try everything that is humanly possible to avoid any repetition.

I can see that the plan has some utility. I think the danger, perhaps the grievous danger, in it would be notifying the local law enforcement official that the person about whom he has inquired is on the dangerous persons list. I do not know how you get around that problem.

Mr. BOYD. The thinking on that was that many of the people on that list are not only against a Secret Service protectee, but also generally antilaw enforcement or antiauthority.

The Secret Service gave a number of examples of when their agents went out, as they do periodically to interview these people, they were attacked. It was believed that we would be remiss in our duty if we had somebody like this that we did not have a caveat in there for the officer so that he could be more on his guard when he is dealing with somebody like this.

Mr. NEMECEK. I might add, Mr. Chairman, that warning notices, as far as the dangerousness of individuals, as you are probably well aware, have been a commonly accepted practice in the criminal justice for years and provide that when an individual is armed or dangerous, whether he is suicidal, he may have various other particular attributes that the officer should be warned regarding.

There are even those occasions where—and it is provided for the safety of the person as well as the officer—and I would not want to sit here and advocate that we are just doing it to help that person.

The primary reasoning behind this file is not that we would be disseminating that information out to the law enforcement officer so that they can put it in a file and keep it or take some other more appropriate action, because I think we can document that we have gone to rather lengthy trying efforts to make this a different type of file, a different type of message, a different type of warning to insure that the officer is aware.

I believe that if you talk to the local law enforcement officer, you will find that they do have a certain sophistication in terms of dealing with this type of person, in terms that they do not always pull out their weapon and fire the first time they are told someone is dangerous.

I think the officer lives with that every day, but we most certainly felt that we had an obligation to the officer to let them know themselves. There are also lesser extent benefits in that it also facilitates the identification of the individual himself. It is saying that it is not a fingerprint match; it is a name and identifier type

of match, and we want to insure that we do have the right individual, if for no other reason that we do not give the Secret Service hundreds of thousands of leads, and you probably are aware of the post-Reagan effort which generally indicated that every bit of information by any law enforcement agency in the country ought to be sent to the Secret Service, and they just indicated an inability to keep up with that magnitude of information.

And, in fact, they most certainly did not want it all. So we tried very hard to balance how much good information we give to the Secret Service and how much is useful to them.

Senator MATHIAS. What it comes down to, really, is the kinds of judgments that go into compiling that list. We have here on Capitol Hill, and you know as well as I, a kind of lunar cycle, bizarre episodes which sometimes involve the same people and sometimes different ones.

At what point do you bring one of those regulars, full mooners, onto the list and at what point do you ignore them?

Mr. BOYD. That is a very——

Senator MATHIAS. That is a very, very delicate question.

Mr. BOYD. The judgments that the Secret Service make are based on multilevel review, plus the availability of consultants in the mental health field, plus based on their experience.

Mr. NEMECEK. We might point out, Mr. Chairman, that based on the figures that were furnished us by Secret Service, of over 9,100 individuals that they investigate every year, at any given time, there are only approximately 400 individuals on this list.

The Secret Service even went so far as to only enter those individuals who are currently on the street; some 250 are generally incarcerated in some way.

I think you have to acknowledge that a great deal of selectivity has gone into who is on this list, and most certainly there are a number of safeguards with regard to utilization of that information in the NCIC file.

Senator MATHIAS. I think that is one area that we—I hope I can speak for the committee as saying we want to work together with you on, keep in close touch with. It is such a volatile, dangerous subject, and yet the possibility, the difficulties, as we have discussed, are always great.

So we will be following very closely. Rather than hold you any longer, I appreciate your patience and your testimony. I will keep the record open and there may be some further questions that we will submit to you in writing and request your answers.

Thank you.

[The prepared statement of Mr. Boyd and additional material, subsequently supplied for the record, follow:]

PREPARED STATEMENT OF KIER T. BOYD

THE OFFICE OF TECHNOLOGY ASSESSMENT REPORT ENTITLED, "AN ASSESSMENT OF ALTERNATIVES FOR A NATIONAL COMPUTERIZED CRIMINAL HISTORY SYSTEM"

Mr. Chairman, we appreciate the opportunity to appear before the subcommittee to discuss the National Crime Information Center (NCIC) and, more specifically, issues related to a national computerized criminal history system for the criminal justice community. With me today are Deputy-Assistant Director Conrad S. Banner, FBI Identification Division, and David F. Nemecek, the Chief of the NCIC. NCIC

was created pursuant to statutory authority contained in 28 U.S. Code, Section 534, and was placed on line in January, 1967. The System is a cooperative effort among city, county, state, and Federal criminal justice agencies which maintain this cost-effective computer-based information system. NCIC now contains over 14,000,000 active records with a daily average of 360,000 transactions. The mean inquiry time is approximately three seconds to the user agency, and the cost to the Federal Government is less than five cents per transaction. The FBI also has served as the repository for fingerprint identification and criminal history record storage and dissemination since 1924 when the FBI was requested by the International Association of Chiefs of Police to provide this service to the nationwide criminal justice community.

During the late 1960's and early 1970's, a need was identified for rapid and efficient exchange of this criminal history information, not possible through the existing manual system. Various efforts were begun to apply computer technology and telecommunications to this need. Despite the best efforts of a number of dedicated individuals, a common viewpoint on how to accomplish this task was not achieved. Attempts to develop a viable automated system, using NCIC, became stagnated in the mid 70's. As I am sure you are aware, at that time the Office of Technology assessment (OTA) was requested to review certain issues related to the creation of a national Computerized Criminal History (CCH) File. Although the goals of the study were worthy, I believe that a combination of factors minimize the report's usefulness as a decision-making tool. Unless reviewed with caution, this report may serve less as an expeditor and more as a deterrence to current successful efforts in developing a national system which meets user needs and properly elevates the role of data quality assurance.

As a result of efforts by the NCIC Advisory Policy Board in 1978, a new initiative known as the Interstate Identification Index (III) was begun. The manner of operation as well as balance of authority and responsibility differs from either the centralized Identification Division operation or the previous NCIC CCH File. With the cooperation, advice, and concurrence of FBI Congressional oversight committees (including the Senate Judiciary), the FBI embarked on a phased testing of the III concept. The approach to this test has been different than other initiatives to implement a national CCH File. With the strong recommendation of the NCIC Advisory Policy Board, as well as the apparently unanimous support of the States, the FBI began to test the concept which relies upon existing computerized resources in the states to be the repositories for and disseminators of criminal history records. The concept requires that an index be maintained at the national level with sufficient identification data on individuals so that when an inquiry is made the inquiring agency can be notified of the likely match as well as the location of the record in a state. For positive identification, the FBI continues to function as a national identification repository through the processing of fingerprint cards. Under the III concept the FBI continues to be the repository of Federal arrest data and will serve as a surrogate for those states who are unable to assume record-keeping responsibility. The first phase of testing has been successfully conducted regarding single-state offenders. The results have been evaluated by the NCIC Advisory Policy Board, a broad-based group of other interested experts, and have been presented to Congressional oversight committees. Based upon the successful completion of the first phase of testing the FBI was advised by the advisory Policy Board to continue to Phase II which tests the decentralization of records on individuals arrested in more than one state. The testing began on May 1, 1983, and will continue for a period of 60 days. Initial results are encouraging and, upon completion of the data collection, the above-described groups will again be asked to evaluate the test and advise regarding future testing. The scope of the testing is to address III's operational, fiscal, managerial, and political acceptability. The decision-making process regarding the establishment of a national system is based upon empirical data evaluated by a broad base of user representatives and other interested parties. I believe that the result which are not being achieved are in consonance with the purpose for which the OTA study was originally requested in 1978.

There have been many drafts of the OTA reports—much correspondence—many discussions—and many frustrating moments during the last five years while trying to assist OTA in its difficult task. As an example of the many difficulties I would like to introduce for the record a brief written analysis of the last draft before the report was published. It was prepared by a consultant employed by the FBI.

Rather than dwelling upon the past, I am pleased to advise the Committee of substantial successes which have been achieved in the resting of the III concept and the recognition of this effort by the states, every segment of the criminal justice community; the Attorney General's Task Force on Violent Crime; Search Group, Incorpo-

rated; and others. This should not be interpreted as saying that all problems are resolved. They are not. But through the current scope of testing, I believe that in a controlled and objective manner, data related to remaining issues will be presented for all persons involved in a decision-making process to develop a national criminal justice information system so important to the criminal justice community at this time. Many initiatives are now being explored in the areas of mandatory sentencing, bond and bail reform, career criminal programs, and identification of and emphasis on violent offenders; however, unless accurate, complete information can be provided, within a matter of hours in many cases, informed decisions cannot be made.

In addition to the III testing, the FBI has also embarked on other pilot projects to develop more effective ways to obtain disposition data, improve data quality and timeliness, and to the maximum extend possible, assure protective of individual privacy. I will be pleased to provide more details during this hearing. As a final check on these efforts, the FBI is implementing a nationwide Audit Program to ensure all NCIC policies are adhered to include those pertinent to the III. Your review in this area is welcome. I am confident that when you have completed the review the subcommittee will also be very encouraged at the progress which has been made and the strides which are soon to be undertaken.

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, D.C., July 20, 1983.

Hon. CHARLES MCC. MATHIAS, JR.,
Chairman, Subcommittee on Patents, Copyrights and Trademarks, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: In your letter dated May 27, 1983, regarding the May 12, 1983 testimony of Kier T. Boyd, Acting Assistant Director, Technical Services Division, you provided several follow-up questions concerning matters raised at the hearing. Attached are the FBI responses to those questions.

On May 27, 1983, Mr. Steve Metalitz of the Subcommittee staff contacted the FBI's Congressional Affairs Section and advised that the Subcommittee was interested in including in the hearing record certain information previously provided to the Subcommittee. Specifically, Mr. Metalitz asked that the following documents concerning the history and establishment of the Interstate Identification Index be included: my January 7, 1980 letter to Senator Kennedy; my March 2, 1981 letter to Chairman Thurmond; my August 3, 1982 letter to Chairman Thurmond; my February 4, 1983 letter to Chairman Thurmond; and the NCIC Advisory Policy Board Quality Assurance Subcommittee, Sacramento, California, December 7, 1982, NCIC staff paper, Topic No. 3, Methods to Improve Disposition Reporting. With regard to the four letters, I have no objection to their publication if the addressees concur. Further, the FBI has no objection to the incorporation of the NCIC staff report into the hearing record.

If I can be of any further assistance please do not hesitate to contact me.

Sincerely yours,

WILLIAM H. WEBSTER, *Director.*

FOLLOW-UP QUESTIONS AND ANSWERS

Question 1. Are the existing sanctions for poor record quality—predominantly, the threat of exclusion from FBI information services—realistic? Has any state ever been excluded for this reason? Do you have thoughts on other sanctions which might be more effective?

Answer. As you are aware, the question of appropriateness of sanctions as applied in the NCIC System has been addressed for a number of years. The unique nature of combined Federal, state, and local relationships which make NCIC such an effective crime-fighting tool makes the answer to the question somewhat complicated. As you note, the predominant sanction for poor record quality for criminal history records is the termination of services to states. Two states currently are denied access to the Interstate Identification Index (III) because of the nonexistence of appropriate management and security control.

To ensure good record quality, a substantial number of record reviews are conducted by the NCIC staff as well as state and local criminal justice agencies. In those instances where the NCIC Advisory Policy Board has determined that record errors are major in nature, "serious errors" are removed from the system by the

FBI if not removed within 24 hours of notification by the entering agency. A substantial FBI commitment of resources has been made to identify and correct these errors. Additional record quality programs engaged in by the FBI and state agencies include periodic record validations and synchronizations, error trend analysis, and research to establish computer edits. Our first line of defense is computer edits which exclude any record entries not in the correct format, using incorrect codes, or not meeting any of the hundreds of other edits designed for each type of entry. The increased effectiveness and responsibility for data quality by NCIC and state control terminal agencies are the most productive efforts to ensure good record quality which the FBI can make at this time.

Question 2. In your testimony on the NCIC/Secret Service "dangerous persons file," you testified that "the one case so far has been successful." Please explain.

Answer. The NCIC U.S. Secret Service (USSS) Protective File was activated at approximately 12:05 p.m. on April 27, 1983. That same date, the Secret Service was advised that an individual from the West Coast who was considered dangerous to its protectees and whose whereabouts had been unknown since early April, had been arrested by local law enforcement officials on unrelated charges in a southern state. As previous established by the NCIC System, USSS Headquarters was advised via its NCIC terminal of the inquiry as the local officer was being advised of USSS interest. During the USSS interview of this individual, he threatened the President and advised that he was en route to Washington, D.C. The USSS does not desire any publicity be given this event since experience dictates that publicity often encourages similar acts. We would point out that, since the activation of the File (April 27–May 30, 1983), there have been 15 valid hits against the File.

Question 3. On the same subject, please explain how the notification to the inquiring officer that a subject is considered dangerous to the President or another Secret Service protectee "facilitates the identification of the individual," as noted in your testimony.

Answer. Over and above the duty to warn a law enforcement officer of the potential dangerousness of individuals whom he may encounter, e.g., caution statements such as "armed and dangerous," "suicidal tendencies," etc., there is an operational need to verify the individual as being the same as the subject of the record. NCIC policy requires any inquiring agency to insure this identity through physical description and unique number verification, as well as subsequent confirmation of the accuracy of the data with entering data. This acts as a backup on the accuracy of the record.

Question 4. What is the basis for the assertion that "many people on that (dangerous persons) list are not only against a Secret Service protectee, but also generally anti-law enforcement or anti-authority"?

Answer. The evaluations putting these individuals on the list are made by the USSS based on its professional judgment concerning dangerousness to protected persons. Practically all, if not actually all, of those contained in this File have had treatment and/or been confined by the mental health and/or criminal law enforcement system in addition to demonstrating a threatening interest in individuals protected by the USSS. The USSS provided examples of where individuals on this list have assaulted its personnel.

Question 5. NCIC has done some research to determine why some states do a better job of reporting disposition data on arrests than do others. You've identified some of the elements that might improve disposition reporting, and recommended that these serve as a model for the states which need improvement.

Could you explain what NCIC has done to encourage states to adopt the elements of this model disposition reporting system?

Answer. The model disposition reporting system is still in the process of being finalized. Once completed, the system will be communicated to all states and will be the subject of the regular NCIC Regional Working Group and Advisory Policy Board meetings. Many states now claim that scarce resources prohibit additional effort and suggest Federal funding as the solution.

Question 6. With respect to the FBI–APB study on the question of non-criminal justice access to criminal history records:

(a) How do the Bureau and the Board plan to conduct this study? What outside views will be solicited?

(b) Will you be looking at possible technological solutions to this problem—for instance, ways to make certain information accessible for some purpose but not for others?

(c) When do you anticipate that the study will be concluded? Would you make the results available to this subcommittee at that time?

Answer. (a) The study will be contracted to consultants who are knowledgeable in this area. Data regarding existing Federal/state law and policy will be collected and alternatives to provide for statutorily-mandated noncriminal justice uses will be developed. Selection of alternatives will be accomplished by the Advisory Policy Board and its Evaluation Group mentioned during testimony. The results will then be furnished to oversight committees and other interested parties.

(b) Technological solutions will be considered. Making "certain information accessible for some purposes but not for others" was previously used in the NCIC Computerized Criminal History File to prohibit the dissemination of arrest data more than one year old but lacking disposition data.

(c) The study will likely continue into 1984. Results of the study will be available to the Subcommittee.

Question 7. What are your plans for the status of the system for interstate exchange of criminal history records five years from now? Or ten years from now? Who has the responsibility for long-range planning for the system?

Answer. No long-range plans are being made for the III until such time as the concept is fully tested. Primary responsibility for long-range planning is the domain of the NCIC Advisory Policy Board in its advisory role to the FBI. The input of a broad group of interests will continue to be solicited.

Question 8. Do you have any indication that some states will not be interested in joining the 3-I system, either because of inability to meet the technical requirements, or concerns about conflicts between state laws and the requirements of the system?

Answer. No. Many states are following the phased III testing to compare with states' participation with their own capabilities. No firm commitment from states evaluating future participation has been requested until they have the opportunity to evaluate Phase II results and findings. However, state/local support for and interest in III appear unanimously favorable. Having built the phased testing to the maximum extent possible on existing Federal/state resources, only minimal expenditures are required to test the concept fully.

Question 9. With regard to the NCIC Secret Service File, the Secret Service already has access to NCIC. Presumably, it could make periodic inquiries about the persons on its "dangerous" list, and thereby learn about any inquiries which had been made. NCIC could also be programed to notify Secret Service if any of a designated list of individuals were arrested.

Were these alternatives considered in discussions between the FBI and Secret Service? Given these alternatives, why was it considered necessary to establish the NCIC/Secret Service File?

Answer. The goal of the NCIC USSS Protective File was to utilize the NCIC as a tool in locating those evaluated as dangerous. This instantaneous notification of their location and ability to facilitate the exchange between the USSS and local law enforcement authorities who come in contact with these individuals has, in just this short period, proved invaluable. Although some other technical means as described could have been used, the timeliness of notification, and completeness of the identification process would not be accomplished. The suggestion that the Secret Service already had access to NCIC and therefore presumably, it could make periodic inquiries about the persons on its "dangerous" list is incorrect. It is not possible to make an online NCIC inquiry and determine if any other agency has made an inquiry on a specific person. The listed alternatives and variations thereof were considered and discarded as unresponsive to USSS needs.

Senator MATHIAS. Now, Mr. Fred Wynbrandt, chairman of the NCIC Advisory Policy Board, and assistant director, Criminal Information and Identification Branch, California Attorney General's Division of Law Enforcement, the man who has made the longest trip to be here.

STATEMENT OF FRED WYNBRANDT, CHAIRMAN, NCIC ADVISORY POLICY BOARD, AND ASSISTANT DIRECTOR, CRIMINAL INFORMATION AND IDENTIFICATION BRANCH, CALIFORNIA ATTORNEY GENERAL'S DIVISION OF LAW ENFORCEMENT

Mr. WYNBRANDT. Thank you, Mr. Chairman.

I would ask that the formal statement that I submitted be included in the record.

Senator MATHIAS. Your full statement will be included in the record.

Mr. WYNBRANDT. I would also ask that a letter that was given to me today from a member of the policy board who felt very compelled that I request that it also be added to the record, which I will.

Senator MATHIAS. It will also become a part of the record of testimony.

Mr. WYNBRANDT. Thank you.

Rather than read my statement, I will make a few opening remarks in regard to my statement and state that the relationship of the policy board to the FBI is covered in the statement. In a protocol-type of way, it has been an excellent relationship.

We have moved ahead with III starting back about 1978 and felt that at the time, the CCH system was not going to succeed. We feel that even in the pilot phases the policy that the interstate identification index is an expression that the time for discussing any other alternatives has passed.

There is a clear consensus and demonstrated feasibility of the complete decentralization of criminal history records.

III, as we term it, is structured around the concept that the records generated by the States are the property of the State and fall under the jurisdiction of that State's privacy and security laws, and that the States, as well as the Federal Government, have a right to decide whether that record should go into the index and at the same time decide whether or not that record should be disseminated.

In the area of record quality, the policy board shares that concern as do the previous speakers. We wish that we had 100 percent of all the arrests and all the dispositions. We feel that that can only be resolved by the States, and we would welcome any assistance that the Congress would give us in regards to improving automation or exploring other mechanisms or alternatives.

I have heard it iterated twice already, and say that in California, for which I can speak, the problem really lies not in the desire to have complete records, but really, as I see it, the inability to.

When you have human resources who have to enter this information, whether it is into the computer or whether they are filling out the form, and you balance these against the fluctuating resources, that is the tax dollars, and the economy, and you put them in a series of priorities as the counties and the courts see them, there is where we have the deterioration.

The problem really comes to resources to accomplish the job. The policy control in regards to the interstate exchange of criminal history information is one of mutual participation between the policy board and the FBI. Policy oversight comes from the policy board, management and operational responsibilities comes from the FBI.

I appreciate the opportunity to be here today, and I am available to answer any of your questions.

Senator MATHIAS. Perhaps by way of identification, I should ask you to identify the author of the letter.

Mr. WYNBRANDT. The author is W. Gray Buckley, agent in charge of the Crime Information Center, Colorado.

Senator MATHIAS. Fine. That will be included.

[The following letter was subsequently supplied for the record.]

COLORADO BUREAU OF INVESTIGATION,
Denver, Colo., May 10, 1983.

National Crime Information Center.

Senator CHARLES MATHIAS,
Chairman, Subcommittee on Copyrights, Patents and Trademarks, Committee on the Judiciary, U.S. Senate, Washington, D.C.

Dear SENATOR MATHIAS: We regret being unable to present our thoughts personally to the Subcommittee on Copyrights, Patents and Trademarks concerning the fine services of the National Crime Information Center (NCIC). We welcome this opportunity to commend the NCIC to you as a model for cooperative federal-State relationships. Sensitive to the lawful needs of the respective states, fulfilling an invaluable mission in interagency law enforcement cooperation and coordination, the NCIC has to be one of the most cost effective services provided by the Federal Government.

NCIC is to local law enforcement the most frequently used and depended upon FBI service. Yet its mission is absolutely simple: Provide and index/reference file for law enforcement officers obliged to deal constantly with an ever increasing, ever more mobile, ever more violent criminal population.

The NCIC functions as the nervous system for peace officers whose duty it is to identify fugitives and stolen property that cross state and county lines. When NCIC is out of service for any reason, officers nationwide are partially blind and deaf to the identity of fugitives and stolen/wanted property.

We have worked with the NCIC staff for years, along with our counterparts in the other states, in the continuous improvement of the nature and quality of NCIC services. The necessarily complex inter-state criminal record exchange relationships, the management of criminal records in compliance with a variety of applicable state and federal laws and regulations, and the ever present FBI/NCIC sensitivity to the need for management of a practical, economical, responsible and accountable record keeping system . . . are intrinsic to the nature of continuing NCIC operation and coordinate activity.

We encourage the Subcommittee to become thoroughly familiar with the NCIC success story and its steadily growing list of significant accomplishments in the apprehension of violent offenders and the recovery of millions of dollars worth of stolen property monthly. Please let us know if we may provide any further information or assistance.

Sincerely,

JOHN R. ENRIGHT,
Director
(By Gray Buckley, Agent in Charge, Crime Information Center).

Senator MATHIAS. You point out that the quality of records in criminal history is better, but as I hear you, you say it is still not good enough.

Mr. WYNBRANDT. Correct.

Senator MATHIAS. NCIC's study last year showed that about a third of the arrests lacked disposition data, which is a pretty high record of incompleteness; that is what it was.

Mr. WYNBRANDT. Yes. I agree, sir. In California, as an example, we are a little bit higher than that, but I have three full-time people who do nothing but go around the entire State and quote a cliche, "beat the bushes" mainly with the courts to get the criminal histories into the system.

That is one method we have used to increase the submission. It is still a problem. I wish we had 100 percent.

Senator MATHIAS. What do you think we ought to do to get the States to improve the quality?

Mr. WYNBRANDT. Well, I think the first line comes in providing resources to the States so that they can add these records, fill out the forms, add them to the computer. It has been my experience in

the law enforcement field that when priorities become a push because of dollars, we find that recordkeeping is one of those that falls out the bottom. And what we need is assistance, assistance to those States that are not fully automated, assistance to those that are automated, so that we can make a big push and get the dispositions in.

Senator MATHIAS. The Justice Department, as I understand it, has regulations that provide that noncomplying States be excluded from the service.

Is this a realistic kind of sanction? It is a tough kind of sanction to work in other ways, and I have seen it through the work of this committee, for example. If there is a State that is not complying on civil rights in education, you can cut off the school funds. But that is such a self-defeating kind of sanction that you do not usually use it.

Is there the same kind of problem with sanctions on the States for noncompliance in the area of record quality?

Mr. WYNBRANDT. One, it is self-defeating; secondly, at what level do you draw compliance? Is it 25 percent, 50 percent, 80 percent?

It is very, very difficult to say what level we are going to cut it off at. I have not, in talking to members of the policy board and the regional groups, not found anyone who does not want 100 percent reporting. We have talked about sanctions within the States, but that is very difficult.

One State, I think Pennsylvania, pays—the State pays each county or county clerk 50 cents for each disposition that they submit. I could say that in California, as an example, the economy is such, and the State budget is such that we cannot afford 50 cents.

But people have tried various alternatives. We have improved, no question. The States have improved. How far we can go, I do not know.

Senator MATHIAS. What about nonjustice access? You say your board is going to look into that question.

Mr. WYNBRANDT. Yes, we are looking into noncriminal justice access. We have asked the FBI to conduct the study to look at the various alternatives. We have recommended and it has been followed, that noncriminal justice access not be allowed to III, and that is the policy we have followed.

I followed this area very closely, as I outlined in my statement, because California is the largest requester of the FBI for noncriminal justice records. California has a great, extensive program by statute for noncriminal justice access.

This area is very complex. It is complex because some States allow only access for criminal justice purposes. Some States are open; what we call open-record States. You can get anyone's record for $2.

Senator MATHIAS. Employment agencies, credit agencies?

Mr. WYNBRANDT. Anyone. You can get your next door neighbor's criminal history record. You can apply to the State and get that record for a minimal fee. In other States, like California, it is controlled very strictly by statute. The statutes detail who has access. It is a very complex issue.

Senator MATHIAS. The States that give you a criminal record for $2 are going to take all the fun out of gossip. Is your board established by regulation?

Mr. WYNBRANDT. Yes. It is established by the Advisory Policy—Federal Advisory Committee Act.

Senator MATHIAS. Do you feel any lack of authority? Do you think you would feel more comfortable if you were a statutory board, if you were established by an act of Congress?

Mr. WYNBRANDT. My feeling is that the board feels very comfortable now. Our relationship with the FBI and Director Webster and the executive assistant directors has been excellent. They have accepted 100 percent of our recommendations. I operate under the adage, "If it is not broken, don't fix it."

I think we are doing very well right now.

Senator MATHIAS. What about the proposals to enlarge your membership? For instance, have some representation from the defense bar, from civil liberties, organizations, perhaps from victims?

Mr. WYNBRANDT. We have expanded the board recently from 26 to 30 members. Those board members are from special organizations such as National Sheriff's, International Chiefs of Police.

In regards to the III, we have an evaluation committee. I have enclosed with my statement a list of the members of that committee. We have had people from the ACLU partipate, invited members of the Senate Judiciary, and the House side, Mr. Berman represents the ACLU; I have spoken with him personally.

We have tried to make this as an expansive a group as possible in order to get input from as many sectors as we can. I think we have done a very good job of broadening it.

Senator MATHIAS. How do you staff the board?

Mr. WYNBRANDT. I'm sorry?

Senator MATHIAS. How do you staff the board?

Mr. WYNBRANDT. How do we staff?

Senator MATHIAS. The board. Who handles your——

Mr. WYNBRANDT. The FBI-NCIC acts as staff to the board, staff to the evaluation committee.

Senator MATHIAS. Do you feel any—are you at all uncomfortable without an independent staff of your own? That is a dangerous question to ask around Washington these days when we are riffing people rather than hiring people, but would there be any virtue in having an independent staff? And I ask that question really because of the high degree of importance that I put on your work and on the independence of your judgments.

Mr. WYNBRANDT. Thank you.

I do not see that there would be any benefit to having an independent staff reporting to the board. The board members are all working practitioners.

When you have a full-time staff, it is very difficult to determine who is going to supervise and spend all that time working on directives. We have been very satisfied with the staff work that comes out of NCIC to the board.

I would say that, if anything, they would need an increase in staff to have all of the material staffed out that we presently request of them. We make an awful lot of requests to the technical services division. There resources are limited, and so sometimes

things get perhaps a bit slow. But as the staff work comes back, it is excellent.

Senator MATHIAS. In another aspect of this committee, the copyright side, I find that it is very difficult to keep up with technological change. We are a long way from the concept of a copyright which covers a printed book being able to protect a whole book on a chip. It is a constantly changing world. How do you keep up with the technological changes?

Let me tell you at the outset that I do not do very well keeping up.

Mr. WYNBRANDT. Neither do I.

The technological changes that take place in regards to the computers themselves and some of the applications are handled, at least, let us say in the California Department of Justice, by our data center, which is not an entity that is under me.

We do get briefings from time to time. We are invited to demonstrations, and so forth, and that is about the limit that I have time for.

I think the technological improvements are coming. We see speed. We see applications. And what we have to do is to have some time to fit those applications into our processes and see whether we can utilize them.

I have the same problem you have. I am not technically oriented, and I have a difficult time staying with it.

Senator MATHIAS. But you do go to trade fairs and whatnot?

Mr. WYNBRANDT. No; I do not. No, sir.

Senator MATHIAS. Does anybody on the board keep up with it?

Mr. WYNBRANDT. Oh, yes. Oh, yes. We have people on the board who are responsible for data centers and attend the trade fairs. I have seen them around the country. They keep up with the technical advances, yes.

Senator MATHIAS. In your written statement you recommend that Congress commit to the III program by assisting States in automating their records and entering additional records in the III system.

Now, if we put up the money, should we call the tune? Should we provide guidance? Should we set standards? Should we, for instance, enforce record quality standards?

Mr. WYNBRANDT. I think at this point I would ask that that question be asked me at a later data. Certainly, we can use the funds to add records to the system and make it more viable. However, I would want to look at all of the data of the pilot project.

I would want to look at the study for noncriminal justice access before stating that this Congress must come through with guidelines.

Senator MATHIAS. Well, we will ask you that at a later date.

Mr. WYNBRANDT. I would be very honored to come back and answer that.

Senator MATHIAS. Thank you.

[Material submitted by Mr. Wynbrandt follows:]

PREPARED STATEMENT OF FRED H. WYNBRANDT

CHAIRMAN MATHIAS, MEMBERS OF THE COMMITTEE, I AM PLEASED TO APPEAR HERE TODAY ON BEHALF OF THE NATIONAL CRIME INFORMATION CENTER ADVISORY POLICY BOARD, COMMONLY REFERRED TO AS THE "APB". THE APB ACTS AS A BOARD OF DIRECTORS FOR ALL OF THE STATE MEMBERS AS WELL AS THE LOCAL CRIMINAL JUSTICE REPRESENTATIVES. THE COUNTRY HAS BEEN DIVIDED INTO FOUR WORKING REGIONS TO ASSIST IN REVIEWING PROPOSED TECHNICAL CHANGES AND POLICY. THEY ARE THE NORTH CENTRAL, NORTH EASTERN, SOUTHERN, AND WESTERN REGIONAL WORKING GROUPS. REGIONAL MEMBERSHIP IS COMPRISED OF THE STATE CONTROL OFFICER AND MEMBERS OF LOCAL LAW ENFORCEMENT AGENCIES ELECTED BY EACH REGION.

EACH REGION ELECTS FIVE OF ITS MEMBERS TO SERVE ON THE ADVISORY POLICY BOARD. IN ADDITION TO THE TWENTY ELECTED BY THE REGIONS, THE DIRECTOR OF THE FBI MAY APPOINT TEN ADDITIONAL MEMBERS REPRESENTING THE COURTS, CORRECTIONS, PROSECUTORS, AS WELL AS REPRESENTATIVES FROM THE NATIONAL SHERIFF'S ASSOCIATION, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, THE NATIONAL CORRECTIONAL ASSOCIATION, AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE.

THE APB IS COMPRISED OF A WORKABLE NUMBER OF MEMBERS WHO REPRESENT THE STATES AS A CONSORTIUM DEALING WITH THE INTERSTATE EXCHANGE OF CRIMINAL HISTORIES AND THE OTHER AUTOMATED DATA BASES MAINTAINED IN THE NATIONAL CRIME INFORMATION CENTER (NCIC). A LIST OF THE APB MEMBERS IS ATTACHED.

FOR THE RECORD I WOULD ALSO ADD THAT I AM ASSISTANT DIRECTOR OF THE CRIMINAL IDENTIFICATION AND INFORMATION BRANCH UNDER THE CALIFORNIA ATTORNEY GENERAL'S DIVISION OF LAW ENFORCEMENT. MY AREA OF RESPONSIBILITY IN CALIFORNIA INCLUDES MAINTENANCE OF

CRIMINAL HISTORY RECORDS, AS WELL AS ALL OTHER ON-LINE DATA BASES, AND ALL TELECOMMUNICATIONS INCLUDING THE CALIFORNIA LAW ENFORCEMENT TELECOMMUNICATIONS SYSTEM, NATIONAL CRIME INFORMATION CENTER, AND NATIONAL LAW ENFORCEMENT TELECOMMUNICATIONS SYSTEM.

THE RELATIONSHIP OF THE APB TO NCIC OPERATIONS ENCOMPASSES TECHNICAL PROTOCOL ABD OVERALL POLICY SETTING. BECAUSE OF THE DIVERSITY OF TECHNICAL CAPABILITIES WITHIN THE STATES, A THOROUGH AIRING IS MADE OF ALL TECHNICAL CHANGES. THESE CONSIDERATIONS AND DELIBERATIONS ARE NECESSARY TO AVOID TECHNICAL CHANGES WHICH WOULD REQUIRE COSTLY PROGRAMMING CHANGES OR ADDITIONAL HARDWARE PURCHASES TO EITHER THE STATE OR THE FEDERAL GOVERNMENT.

IN THIS ERA OF DWINDLING RESOURCES, CONSIDERATION IS GIVEN BY THE FBI AND THE STATES, AS WELL AS LOCAL LAW ENFORCEMENT, TO CHANGES WHICH ARE COSTLY AND PRODUCE ONLY MARGINAL GAINS.

POLICY CONSIDERATIONS ARE SUGGESTED BOTH BY THE PARTICIPANTS IN THEIR REGIONS AND THE FBI. MANY OF THE POLICY CONSIDERATIONS ARE REFERRED TO A VARIETY OF APB COMMITTEES WHICH HAVE BEEN ESTABLISHED TO DEAL WITH SPECIFIC AREAS. OCCASIONALLY THERE IS AN OVERLAP OF MORE THAN ONE COMMITTEE IN THE CONSIDERATION OF A TOPIC. AS AN EXAMPLE, THE QUALITY ASSURANCE COMMITTEE HAS REQUESTED THEIR MEETING BE ATTENDED BY THE CHAIRMAN OF THE INTERSTATE IDENTIFICATION INDEX COMMITTEE TO DISCUSS PROBLEMS REGARDING DISPOSITION REPORTING.

THE DELIBERATIONS BETWEEN THE REGIONAL WORKING GROUPS AND POLICY BOARD COMMITTEES HAVE NECESSITATED A CLOSE WORKING RELATIONSHIP WITH NCIC STAFF. THIS RELATIONSHIP, AT LEAST OVER THE PERIOD OF TIME I HAVE BEEN ASSOCIATED WITH THE POLICY BOARD, HAS BEEN A GOOD ONE. THE DIRECTOR OF THE FBI HAS ACCEPTED 100% OF THE RECOMMENDATIONS MADE BY THE ADVISORY POLICY BOARD.

ADDITIONALLY, THE DIRECTOR AND THE TWO EXECUTIVE ASSISTANT DIRECTORS HAVE MET WITH THE CHAIRMAN OF THE APB TO DISCUSS AREAS OF MUTUAL CONCERN. I HAVE FOUND THAT THESE GENTLEMEN WISH TO COOPERATE AND ASSIST LOCAL LAW ENFORCEMENT TO THE EXTENT THEY CAN.

THE MAIN AREA OF INTEREST IN THE PRESENT HEARINGS CONCERNS THE IMPLEMENTATION OF THE PILOT PROJECT OF THE INTERSTATE IDENTIFICATION INDEX (TRIPLE I). THE ADVISORY POLICY BOARD MEMBERS FELT THAT THE COMPUTERIZED CRIMINAL HISTORY (CCH) SYSTEM WOULD NEVER SUCCEED BECAUSE OF LIMITATIONS ON RESOURCES, DUPLICATION OF RECORDS, AND LOSS OF CONTROL OF THOSE RECORDS SENT TO THE FBI. IN ADDITION, DURING THE PERIOD CCH WAS IN OPERATION, MANY OF THE STATES REVEALED THAT THOUGH NOT PARTICIPATING IN CCH, THEY HAD IMPROVED THEIR SYSTEMS THROUGH AUTOMATION. THIS INCREASE IN SOPHISTICATION AT THE STATE LEVEL IS ANOTHER FACTOR WHICH LED TO THE CONCLUSION THAT A FULLY DECENTRALIZED CRIMINAL HISTORY SYSTEM CONTROLLED BY THE STATES WAS FEASIBLE AND PRACTICAL.

THE ADVISORY POLICY BOARD, THROUGH THE TRIPLE I SUBCOMMITTEE, BEGAN DEVELOPING PLANS FOR IMPLEMENTATION OF A PILOT PROJECT IN 1978 TO DEMONSTRATE THE FEASIBILITY OF A DECENTRALIZED SYSTEM. AS YOU MAY WELL KNOW, THIS STARTED WITH PHASE I AND INCLUDED ONLY THE STATE OF FLORIDA. PHASE I WAS SUCCESSFUL.

PHASE II ENCOMPASSED THOSE STATES WHICH WERE PART OF THE CCH SYSTEM. PHASE II ALSO PROVED SUCCESSFUL.

PRESENTLY WE ARE INVOLVED IN PHASE III OF THE PILOT PROJECT WHICH ENCOMPASSES 15 STATES AND APPROXIMATELY 7 MILLION RECORDS. THOSE STATES PARTICIPATING IN PHASE III ARE:

CALIFORNIA	MINNESOTA	PENNSYLVANIA
COLORADO	NEBRASKA	SOUTH CAROLINA
FLORIDA	NEW JERSEY	TEXAS
GEORGIA	NEW YORK	VIRGINIA
MICHIGAN	NORTH CAROLINA	WYOMING

THOUGH I DO NOT HAVE ANY OVERALL, UP-TO-DATE STATISTICS, CALIFORNIA IS RESPONDING TO APPROXIMATELY 40 REQUESTS PER DAY FROM THROUGHOUT THE UNITED STATES. THE SYSTEM INDICATES ABOUT 34% OF THE HITS AND REQUESTS ARE FROM THE STATE OF TEXAS.

IN REVIEWING THE STATISTICS FROM PHASE II AND IN EXAMINING THE REQUESTS WHICH ARE BEING RECEIVED DAILY, IT IS OBVIOUS THAT INDIVIDUALS WHO COME IN CONTACT WITH LAW ENFORCEMENT AGENCIES IN STATES OTHER THAN WHERE THEY WERE ARRESTED ARE VERY MOBILE. I HAVE BEEN INFORMED THAT THE PRESENT HIT RATE ON PHASE III IS APPROXIMATELY 25%. THIS IS SIGNIFICANTLY HIGHER THAN HAD BEEN ANTICIPATED.

THE TRIPLE I COMMITTEE AND THE APB HAVE HAD SUBSTANTIAL INVOLVEMENT IN THE IMPLEMENTATION OF THIS PILOT PROJECT.

DURING 1982, THE APB APPROVED MINIMUM STANDARDS FOR PARTICIPATION. IT REQUIRED THAT A STATE WISHING TO PARTICIPATE MUST AGREE TO RESPOND TO TRIPLE I RECORD REQUESTS WITH A RECORD OR AN ACKNOWLEDGMENT AND NOTICE WHEN THE RECORD WOULD BE RETURNED. STATE RESPONSES TO TRIPLE I REQUESTS MAY BE MADE BY MAIL AS LONG AS A MESSAGE WAS SENT TO ACKNOWLEDGE THE REQUEST AND ADVISE WHEN THE RECORD WOULD BE MAILED.

THE APB REQUIRED THAT TRIPLE I RECORDS ESTABLISHED AND MAINTAINED FOR THE STATES IN THE INDEX WOULD BE REPRESENTED BY RECORDS IN THE FBI'S AUTOMATED IDENTIFICATION DIVISION SYSTEM (AIDS). THIS PROCEDURE WOULD ENSURE THE AVAILABILITY OF DATA FROM NON-PARTICIPATING STATES WHEN THE RECORDS BECOME MULTI-STATE.

THE APB FURTHER ESTABLISHED THE POLICY OF ONE TYPE OF RECORD RESPONSE WHICH WOULD BE AVAILABLE VIA TRIPLE I. STATE AGENCIES WITH AN ESTABLISHED SYSTEM MAY USE THEIR EXISTING RECORD FORMAT.

THE APB FURTHER ESTABLISHED THAT INQUIRIES FOR EMPLOYMENT AND LICENSING PURPOSES WOULD BE PROHIBITED DURING THE PHASE III TESTING. THESE TYPES OF INQUIRIES HAVE BEEN PROHIBITED FROM THE ONSET OF THE PROJECT. THE TRIPLE I DEVELOPMENT SCHEDULE INCLUDES THE REQUIREMENT THAT A SIX-MONTH STUDY AND ANALYSIS BE MADE WHICH INCLUDES THE NEED OF NON-CRIMINAL JUSTICE USERS. THIS STUDY WOULD ADDRESS THE PROBLEM OF NON-CRIMINAL JUSTICE ACCESS TO THE INDEX. I HAVE SPECIFIC COMMENTS REGARDING THIS ISSUE WHICH I WILL ADDRESS LATER.

I ANTICIPATE THAT FUTURE CONSIDERATIONS BY THE TRIPLE I COMMITTEE AND THE APB WILL INCLUDE EXAMINING THE FEASIBILITY OF ADDING ADDITIONAL RECORDS TO TRIPLE I. MANY OF THE STATES PARTICIPATING IN PHASE III OF THE PROJECT HAVE RECORDS WHICH ARE AUTOMATED AT THE STATE LEVEL AND NOT ON FILE IN THE FBI IDENTIFICATION DIVISION.

AT A LATER DATE THE APB WILL BE EXAMINING THE FEASIBILITY OF ADDING ADDITIONAL STATES WHICH HAVE EXPRESSED A DESIRE TO PARTICIPATE BUT ARE NOT PREPARED TO DO SO AT THIS TIME. OTHER TECHNICAL INNOVATIONS SUCH AS CROSS-INDEXING WILL BE DISCUSSED. CROSS-INDEXING CONCERNS AN INQUIRY INTO THE INDEX WHICH COULD ALSO TRIGGER AN INQUIRY INTO THE WANTED PERSONS SYSTEM. THUS INDIVIDUALS WITH OUTSTANDING WARRANTS COULD BE IDENTIFIED BY TRIPLE I INQUIRIES.

THE AREA OF COST BENEFIT IS VERY IMPORTANT AND HAS BEEN DISCUSSED BY THE PARTICIPANTS IN TRIPLE I AS WELL AS THE POLICY BOARD. IMPLEMENTATION OF THE INDEX ELIMINATES THE COST OF MAINTAINING DUPLICATE RECORDS. THAT IS, A RECORD MAINTAINED AT THE STATE LEVEL IS NOT DUPLICATED IN WASHINGTON. THIS, COUPLED WITH THE GOAL WHEREBY ONLY THE FINGERPRINT CARD REPRESENTING AN INDIVIDUAL'S INITIAL ENTRY INTO THE CRIMINAL JUSTICE SYSTEM WILL BE FORWARDED TO THE FBI BY THE STATE OF RECORD, WILL RESULT IN

CONSIDERABLE RESOURCE SAVINGS AT BOTH THE STATE AND FEDERAL LEVEL.

SAVINGS HAVE ALREADY BEEN ACHIEVED BY SOME STATES BECAUSE OF PROCEDURES DEVELOPED DURING PHASE I OF THE PROJECT. PROTOCOL WAS DEVELOPED WHEREBY THE FBI IDENTIFICATION DIVISION UNDER ITS AIDS PROGRAM FORWARDS A TAPE TO THE STATE OF RECORD WHICH CONTAINS THE FBI NUMBERS ASSIGNED TO NEW OFFENDERS. THIS PERMITTED THE STATE TO ENTER THE FBI NUMBERS VIA A COMPUTER AS OPPOSED TO MANUAL ENTRY GENERATED BY A PIECE OF PAPER. RECENT PROCEDURES ALLOW THE ON-LINE ENTRY OF FBI NUMBERS DIRECTLY FROM NCIC. AS AN EXAMPLE, WHEN THIS PROCEDURE IS IMPLEMENTED IN CALIFORNIA, SAVINGS WILL AMOUNT TO APPROXIMATELY $30,000 ANNUALLY.

EVEN IN THE PILOT PHASES THE INTERSTATE IDENTIFICATION INDEX IS AN EXPRESSION OF THE APB THAT TIME FOR DISCUSSION OF ALTERNATIVES HAS PASSED. THERE IS A CLEAR CONCENSUS AND DEMONSTRATED FEASIBILITY OF THE COMPLETE DECENTRALIZATION OF CRIMINAL HISTORY RECORDS. TRIPLE I IS STRUCTURED AROUND THE CONCEPT THAT THE RECORDS GENERATED BY THE STATES ARE THE PROPERTY OF THAT STATE AND FALL UNDER THE JURISDICTION OF THAT STATE'S PRIVACY AND SECURITY LAWS.

THE STATES, AS WELL AS OUR COUNTERPARTS IN THE FEDERAL GOVERNMENT, HAVE THE RIGHT TO DECIDE WHETHER THAT RECORD SHOULD GO INTO THE INDEX AND AT THE SAME TIME, DECIDE WHETHER OR NOT THAT RECORD MAY BE DISSEMINATED.

I DO NOT MEAN TO IMPLY THE APB AND THE TRIPLE I SUBCOMMITTEE HAVE ATTEMPTED TO ANSWER ALL OF THE PROBLEMS ASSOCIATED WITH THE INTERSTATE EXCHANGE OF CRIMINAL HISTORY INFORMATION. WE HAVE, HOWEVER, TAKEN FIRM, POSITIVE STEPS IN DEALING WITH THE ISSUES AND OVERSEEING A PILOT PROJECT WHICH APPEARS TO BE VERY SUCCESSFUL. I AM CERTAIN THE APB, IN CONJUNCTION WITH NCIC, WILL

CONTINUE TO ADDRESS THE ISSUES, MOVE FORWARD, AND TAKE INTO CONSIDERATION INDIVIDUALS' RIGHTS TO PRIVACY.

AS STATED PREVIOUSLY, THE APB IS COGNIZANT OF THE PROBLEMS ASSOCIATED WITH NON-CRIMINAL JUSTICE ACCESS OF INFORMATION IN THE INDEX. THE POLICY BOARD HAS RECOMMENDED THAT DURING THE PILOT PHASE NO NON-CRIMINAL JUSTICE ACCESS BE ALLOWED. WE HAVE REQUESTED THAT THE FBI, IN CONJUNCTION WITH THE APB, UNDERTAKE A STUDY TO EXAMINE THE FEASIBILITY AND PROBLEMS ASSOCIATED WITH NON-CRIMINAL JUSTICE ACCESS TO THE RECORDS IN VIEW OF ESTABLISHING A NATIONAL INDEX. THE PROBLEMS ASSOCIATED WITH THIS STUDY CONCERN NOT ONLY THE INDEX BUT THE POSSIBLE TRANSFER OF CRIMINAL HISTORY INFORMATION BETWEEN STATES FOR NON-CRIMINAL JUSTICE PURPOSES.

THIS PROBLEM, IN COMPARISON TO OTHERS, IS VERY COMPLEX AND DIVERSIFIED. CALIFORNIA, AS AN EXAMPLE, IS THE LARGEST CONTRIBUTOR OF NON-CRIMINAL FINGERPRINTS TO THE FBI IDENTIFICATION DIVISION. ALL OF THESE SUBMISSIONS ARE MADE PURSUANT TO STATUTES ENACTED BY THE CALIFORNIA LEGISLATURE. THE LEGISLATURE RECOGNIZES THE NEED FOR THIS TYPE OF INFORMATION FOR THE SPECIFIC PURPOSE OF LICENSING, EMPLOYMENT, AND CERTIFICATION.

FOR EXAMPLE, THE CALIFORNIA LEGISLATURE FEELS THAT TEACHERS WHO ARE LICENSED TO TEACH SHOULD BE SUBJECT TO A CRIMINAL HISTORY CHECK TO ENSURE THEY ARE NOT INDIVIDUALS WHO HAVE BEEN INVOLVED IN INCIDENTS OF CHILD ABUSE OR SEX CRIMES.

THE INTERSTATE EXCHANGE OF CRIMINAL HISTORY INFORMATION FOR NON-CRIMINAL JUSTICE PURPOSES IS COMPLEX BECAUSE SOME STATES, SUCH AS CALIFORNIA, HAVE SPECIFIC STATUTES; OTHER STATES HAVE TOTALLY OPEN RECORDS, AND SOME STATES PROHIBIT THE USE OF CRIMINAL HISTORY INFORMATION FOR <u>ANY</u> PURPOSE OTHER THAN CRIMINAL

JUSTICE PURPOSES. I AM CERTAIN THE STUDY WILL ADDRESS THE MANY ALTERNATIVES WHICH MAY BE USED IN RESOLVING THIS PARTICULAR ISSUE. SOME STATES, INCLUDING CALIFORNIA AND NEW YORK, CHARGE A FEE FOR NON-CRIMINAL JUSTICE INQUIRIES. THESE REQUIREMENTS MUST BE TAKEN INTO CONSIDERATION.

THE STUDY MUST ALSO LOOK AT WHETHER FINGERPRINT CARDS WILL BE REQUIRED FOR NON-CRIMINAL JUSTICE CRIMINAL HISTORY CHECKS. THOUGH THIS CONCERN HAS NOT BEEN RAISED BEFORE, A NUMBER OF STATES REQUIRE FINGERPRINT CARDS FOR NON-CRIMINAL JUSTICE CHECKS TO ELIMINATE THE POSSIBILITY OF MISIDENTIFICATION. MISUSE MAY RESULT SHOULD AN IMPROPER IDENTIFICATION BE MADE ON THE BASIS OF NAME ONLY. LICENSING AND EMPLOYMENT AGENCIES DO NOT HAVE THE SAME LEVEL OF INVESTIGATIVE PROTOCOL OR TRAINING AS LAW ENFORCEMENT AGENCIES.

IN THE AREA OF RECORD QUALITY AND CONTENT THE BOARD FEELS ANY CRIMNAL HISTORY SYSTEM SHOULD CONTAIN 100% OF THE ARRESTS AND 100% OF THE DISPOSITIONS ASSOCIATED WITH THOSE ARRESTS. A SYSTEM WHICH INVOLVES HUMAN BEINGS, TOGETHER WITH FLUCTUATION IN FINANCIAL SUPPORT, IS ALWAYS SUSCEPTIBLE TO A PERFORMANCE LEVEL WHICH IS LESS THAN 100%. SIGNIFICANT STRIDES HAVE BEEN MADE BY THE STATES IN THE COLLECTION OF DISPOSITION INFORMATION, ESPECIALLY STATES HAVING AUTOMATED SYSTEMS.

RECORD QUALITY ISSUES ASSOCIATED WITH A DECENTRALIZED NATIONAL PROGRAM ARE ISSUES THAT CAN ONLY BE RESOLVED BY THE STATES. FEDERAL PARTICIPATION WOULD BE WELCOMED IN ASSISTING THE STATES TOWARD IMPROVING AUTOMATION AND THE EXPLORATION OF MECHANISMS FOR MESHING COURT DATA SUBMISSIONS INTO THE CRIMINAL HISTORY PROGRAM. A FEDERAL COMMITMENT TO THIS PROGRAM IS LACKING AND THOUGH IT HAS BEEN BEFORE CONGRESS ON PRIOR OCCASIONS, NOTHING HAS BEEN DONE. THE PROGRESS MADE HAS BEEN MADE BY THE STATES THEMSELVES.

RESOLUTION OF THIS PROBLEM IS NOT A SIMPLE ONE. EXAMINATION OF SUBMISSIONS OF ARREST INFORMATION INDICATES THE POLICE AGENCIES ARE SUBMITTING INFORMATION IN OVER 80% OF THE CASES. PERHAPS THIS MAY BE ATTRIBUTED TO THE QUASI MILITARY ENVIRONMENT OF A LAW ENFORCEMENT AGENCY. DISPOSITIONS, MANY OF WHICH ARE SUBMITTED BY THE COURTS, ARE COLLECTED AND SUBMITTED IN A TOTALLY DIFFERENT ENVIRONMENT. CRIMINAL JUSTICE INFORMATION PRACTITIONERS HAVE DISCUSSED THIS PROBLEM AT GREAT LENGTH. THOUGH STATE LAWS MAY REQUIRE REPORTING OF ARREST AND DISPOSITION INFORMATION, THERE ARE NO SANCTIONS THAT CAN BE APPLIED FOR NON COMPLIANCE.

AS PREVIOUSLY NOTED, THE APB HAS APPROVED A STANDARD FORMAT FOR RECORDS WHICH WOULD BE TRANSMITTED OVER TRIPLE I. A GREAT DEAL OF DISCUSSION WENT INTO DEVELOPING THE RECORD CONTENT FORMAT. THIS FORMAT WOULD BE THE MINIMUM REQUIRED WHEN TRANSMITTING INFORMATION FROM STATE TO STATE.

POLICY CONTROL IN REGARDS TO THE INTERSTATE EXCHANGE OF CRIMINAL HISTORY INFORMATION MUST BE ONE OF MUTUAL PARTICIPATION BETWEEN THE STATES AND THE FBI. THIS IS NECESSARY BECAUSE THE MAJORITY OF THE RECORDS LISTED IN THE INDEX ARE FROM THE STATES; YET THE FEDERAL OFFENDER FILE AND THAT INFORMATION IN THE AIDS PROGRAM (WHICH ACTS AS A SURROGATE FOR NON-PARTICIPATING STATES) ARE ALL EQUALLY IMPORTANT. POLICY OVERSIGHT COMES FROM THE APB. MANAGEMENT AND OPERATIONAL RESPONSIBILITY FOR THE TRIPLE I SYSTEM ARE THE RESPONSIBILITY OF THE FBI.

THE POLICY BOARD HAS BEEN APPRECIATIVE OF PRIVACY CONSIDERATIONS INVOLVING THE EXCHANGE OF CRIMINAL HISTORY INFORMATION. THE APB HAS, DURING ITS PILOT PROGRAM, RESTRICTED USAGE OF THAT INFORMATION UNTIL ISSUES CONCERNING NON-CRIMINAL JUSTICE USERS HAVE BEEN RESOLVED.

THE RECOMMENDATIONS OF THE POLICY BOARD HAVE BEEN ACCEPTED BY THE

DIRECTOR OF THE FBI. I HAVE MET WITH DIRECTOR WEBSTER AND THE EXECUTIVE ASSISTANT DIRECTORS TO EXPRESS BOTH THE BOARD'S APPRECIATION FOR MUTUAL COOPERATION AND TO INDICATE AREAS OF CONCERN. THE ONLY AREA OF CONCERN INVOLVES PROGRAMS COMPETING FOR THE LIMITED RESOURCES OF THE TECHNICAL SERVICES DIVISION.

THE APB HAS RECOMMENDED THE EXPANSION OF THE BOARD TO INVOLVE THE CRIMINAL JUSTICE SYSTEM IN AS BROAD A PERSPECTIVE AS POSSIBLE. A TRIPLE I EVALUATION COMMITTEE, APPOINTED BY THE CHAIRMAN, FUNCTIONS AS AN ADVISORY GROUP TO THE SUBCOMMITTEE. I HAVE ATTACHED A COPY OF THE MEMBERSHIP ROSTER OF THIS EVALUATION COMMITTEE AND WISH TO EMPHASIZE THAT NOT ONLY DO WE HAVE INDIVIDUALS FROM THE CRIMINAL JUSTICE SYSTEM, BUT HAVE INCLUDED MEMBERS OF THE HOUSE AND SENATE JUDICIARY STAFF. MEMBERS OF THE NAACP AND THE ACLU ALSO PARTICIPATE. THE ADVICE FROM THIS GROUP HAS BEEN VERY VALUABLE. THE APB, IN CONJUNCTION WITH THE FBI, HAS EFFECTIVELY REPRESENTED THE INTERESTS OF THE DIVERSE USERS OF A NATIONAL SYSTEM AND HAVE DEMONSTRATED A STRONG POLICY ROLE.

IN CONCLUSION, I WOULD LIKE TO REITERATE THAT THE TIME FOR DISCUSSING ALTERNATIVES IS BEHIND US. THE TRIPLE I HAS SHOWN ITSELF, EVEN IN ITS PILOT PROGRAM, TO BE COST BENEFICIAL, EFFECTIVE, AND EFFICIENT. IT IS NOW TIME FOR CONGRESS TO COMMIT TO THIS PROGRAM. CONGRESS COULD ASSIST PARTICIPATING STATES IN ENTERING ADDITIONAL RECORDS WHICH ARE NOT IN THE FBI. CONGRESS COULD ASSIST THOSE STATES WHOSE LEVEL OF AUTOMATION SHOULD BE IMPROVED. ADDITIONAL FUNDS, AS NEEDED, COULD BE BUDGETED FOR THE FBI. A COMMITMENT BY CONGRESS, IN THIS VEIN, WOULD SHOW A CLEAR DIRECTION ON THE PART OF THE FEDERAL GOVERNMENT IN REGARDS TO THE DEVELOPMENT AND IMPLEMENTATION OF A PROGRAM WHICH HAS ALREADY DEMONSTRATED ITSELF.

I APPRECIATE THE OPPORTUNITY TO HAVE PRESENTED MY VIEW AND WOULD BE HAPPY TO ENTERTAIN QUESTIONS THE SUBCOMMITTEE MAY HAVE.

22-817 O—83——7

NCIC Advisory Policy Board

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Mr. Ted Busch, Assistant District Attorney, Harris County, 500 Criminal Courts Building, Houston, Tex. 77002.

FOLLOW-UP QUESTIONS AND ANSWERS

Question. In order to tackle the problem of record quality, should Congress give the NCIC the power and the resources to conduct random audits of the criminal history files of participating states, to include authority to verify file data against primary sources?

Answer. I do not feel NCIC requires this power at this time. Currently, a pilot program is underway to audit record quality at the state level.

Since this has been initiated as a pilot program, insufficient information is available to assess the need for additional resources. Additional authority does not appear necessary at this time. However, the option for congressional authority and resources should be kept open and its need reevaluated at a later date.

Question. With respect to the FBI-APB study on the question of non-criminal justice access to criminal history records:

(a) How do the Bureau and the Board plan to conduct this study? What outside views will be solicited?

(b) Will you be looking at possible technological solutions to this problem—for instance, ways to make certain information accessible for some purposes but not for others?

(c) When do you anticipate that the study will be concluded? Would you make the results available to this subcommittee at that time?

Answer. Since the questions regarding the FBI-APB study on non-criminal justice access are in negotiation, I shall defer this response to the FBI.

Question. Assuming continued Congressional inaction, what do you think will be the status of the system for interstate exchange of criminal history records 5 years from now? Or 10 years from now?

Answer. Congressional inaction will be a conscious decision. It is the intent of the APB to require that each phase of the III Project be reviewed by the Senate and the House of Representatives prior to full implementation.

With concurrence from the Congress and full implementation, I feel the status of III will be to involve a data base of 85 percent of the available criminal histories in the country within 5 years.

The program will include manual as well as automated records. Within 10 years, the program will include over 90 percent of the cirminal histories in the United States.

I feel the pressures for more States to automate will increase. The increased level of automation will result in an increase in record quality, better audit information, and resolution of non-criminal justice access by a workable system.

Senator MATHIAS. Our next panel will be Mr. George Trubow, professor of law at John Marshall School of Law, Chicago, and director of the Center for Information Technology and Privacy Law; and Donald L. Doernberg, associate professor of Law, Pace Law School in White Plains, N.Y., who appears on behalf of the ACLU.

Gentlemen, we are happy to have you.

STATEMENTS OF GEORGE TRUBOW, PROFESSOR OF LAW, JOHN MARSHALL SCHOOL OF LAW, CHICAGO, ILL., AND DIRECTOR, CENTER FOR INFORMATION TECHNOLOGY AND PRIVACY LAW; AND DONALD L. DOERNBERG, ASSOCIATE PROFESSOR OF LAW, PACE LAW SCHOOL, WHITE PLAINS, N.Y., ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION

Mr. TRUBOW. My colleague, Mr. Doernberg has a tight plane schedule, and if it is all right with the chairman, I would defer to him to begin first.

Senator MATHIAS. We are happy to arrange it any way that you like.

Mr. DOERNBERG. My thanks to the Chair and to Professor Trubow, and I appreciate the courtesy.

With your permission, I ask that my full statement and its attachment be entered into the record so that I can address the Chair——

Senator MATHIAS. It will be included.

Mr. DOERNBERG. For my presentation, Mr. Chairman, I will focus primarily on the issues of the data quality, that is to say, accuracy and completeness which have been mentioned earlier this afternoon, and Professor Trubow is going to talk about questions of access to data and dissemination of data.

In a way, talking about data quality is a little bit like people used to say about the weather: Everybody talks about it and nobody does anything about it. My experience in the area has indicated that all of the people who are in this area are quick to affirm, as did the last speaker, that they wish the quality of the data was better, that they wish that they were able to get 100 percent dispositions reported.

Unfortunately, nobody has been able to make any substantial strides in that area. As the Chair observed at the outset, good decisions require good facts. Good facts are composed really of two different components: One is facts which are accurate; that is to say, not incomplete or misleading or just dead wrong.

The other is facts which are in fact relevant, things which should be considered in the process. The Chair also earlier alluded to the old computer saying, "Garbage in, garbage out."

A few years ago a very perceptive law student at Villanova wrote a Law Review note which he entitled "Garbage In, Gospel Out."

And I fear that he actually captured the essence of much of what goes on with computer information systems today. The reason those systems are so dangerous is that whatever comes out of them is taken as gospel by those who must use them and depend upon them, primarily the courts.

Senator MATHIAS. That is not just true of what a computer prints out, but also any printed word. People see it in print and it almost has to be true.

Mr. DOERNBERG. That is true, Mr. Chairman. In this area, it is particularly harmful because at least when we're talking about the criminal justice system, the likely consequence of garbage in, gospel out is time in jail. It seems to me that we owe our citizens, even those we suspect of crime, at the very least, the reasonable assurance that if they are imprisoned, it will be because they have been adjudicated guilty of a crime, not because somebody has leveled an accusation at them, and certainly not because someone leveled an accusation at them 5 years ago which was never proven.

One of the matters which the FBI spokesman dealt with was the use of what they called nonconviction data in the criminal justice system. And I urge the committee that those data should not be permitted to be used, and when I speak of nonconviction data in this sense, I refer to charges which have been dismissed or of which the defendant was adjudicated not guilty.

I do not refer to open charges. Those are in a different category.

But with respect to charges that have been disposed of, it seems to me that there is no legitimate inference that the law enforcement system can make with respect to such charges that is adverse to the individual. Unfortunately, on a daily basis that kind of inference is made, and in effect, if we permit those data to be used, what we are saying to the individual is that not only are you going to be tried on those charges when they come up in court, but that

in any further contact with the criminal justice system, you are again going to be charged on those charges because, as the FBI speakers indicate, further investigation may be done, and therefore the criminal justice system may be able either to take into account those charges or not take them into account, as it sees fit.

The problem with that further investigation, apart from the fact that the charges have been disposed of, is that the accused may never know that the investigation occurs and certainly does not get the elementary right of confrontation and opportunity to present evidence of his own in order to overcome the effect of those charges.

At least when he is being tried on them the first time, we give him that.

When the charges come back at a second or a third arrest, we do not give him that option and the day-to-day result as we saw in the State of New York is that clients of the public defender agencies, for the most part, because those are the people who cannot make bail, have bail set higher than it should be, and they go to jail.

I think it is fair and not really an overdramatization for me to say that as we sit here talking today, across the country in courtrooms people are being condemned to spend time in jail because of rap sheets. And it is time that they should not be spending in jail.

Now, if people have to be sent to jail because they have committed crimes and been adjudicated and sentenced, that is fine. That is a result we can all live with. In fact, I suspect it is a result that we cannot live without.

I think the result that we cannot tolerate in the constitutional system is for people to be sent to jail on the basis of bare accusations, and that is what is happening even as we sit here today.

Now, the problem with record quality, in part, is that it is not documented. This is the last thing that I really want to present. Then I would be happy to accept questions from the Chair.

We did a study in the course of the litigation that I referred to in my statement where we studied the entire New York State rap sheets, and it was, I believe, at the time, the first such study that had been done in any State system. In short, what it showed is that for 73 percent of the arrest entries, there was some defect with the disposition data. Most of the time they were just missing.

That is to say, cases which, in fact, were closed were reported as open cases. Sometimes cases were reported incorrectly. Dismissals were reported as convictions, which prejudices the defendant. Convictions were reported as dismissals, which obviously prejudices the public interest because if this is a multiple offender, it is something that the judge should know.

Senator MATHIAS. So the errors go both ways.

Mr. DOERNBERG. Absolutely. More often cases which, in fact, had been dismissed were reported as convictions, but the errors did go both ways, and sometimes the data were simply incomplete. The curious thing about that study which we did in 1977 is that during the further course of the litigation in New York, in 1981, the State of New York did its own study in response to a motion which we made to enforce the judgment, and their study, though I am sure it was not their intent, but that is the way it turned out, their study confirmed ours.

It confirmed it, as I recall, to within 3 or 4 percentage points, which was heartening in the sense that it told us that we had done the audit right in the first place, which we were sure of; it was disheartening because one of the things it told us was that in the 4 years between the two studies, there was no substantial improvement in New York in regard to record quality.

And in fact, before I came down here. I spoke with several of my old colleagues in the Legal Aid Society in New York City. They advised me that there has been no substantial change in the quality of rap sheets.

Now, the last question that the Chair asked of the preceding speaker, one of the last questions was: Since we, the Congress, put up the funds, should we call the tune with respect to standards?

My answer to that is a resounding yes. Because what we have discovered over the last 12 years, when Congress has been involved, is that if Congress does not call the tune, then we have 50 different jurisdictions dancing to 50 different tunes. And unfortunately none of them are producing data of very reliable quality.

Mr. Chairman, I would be happy to answer whatever questions you have.

Senator MATHIAS. Well, how high does record quality have to be to be acceptable? Is it realistic to think that you are going to say, get 100-percent-accurate disposition records within 30 days of the event?

Mr. DOERNBERG. No, it probably is not realistic, Mr. Chairman, but there are ways without specifying a quality target that we can build in systems which will insure substantially greater record quality. For example, one of the things we proposed to the court in New York when we litigated the Tatum case was that after 90 days, if a case still appeared open in the records of the State agency, they should have to make an inquiry to see if the case really was open.

If it was not, then they had to add in the disposition. If it was, then they could continue to carry the case as an open case.

What that would insure, based on the figures that we found in New York, is that most cases would have their dispositions reported within 90 days. The reason that we picked the 90 days is because in the city of New York, which accounts for the majority of the State's criminal cases, three out of four cases are disposed of before 90 days.

And, therefore, if we had that sort of periodic inquiry, it would ensure that data quality was regularly updated.

Senator MATHIAS. That leads me to my next question. You imply that computerization in many States has exacerbated the quality problem, and I think we have to be concerned by that because the Federal Government has the responsibility of having funded a lot of that computerization.

Yet, the OTA study indicates that record quality has improved in computerized States. So there is either a conflict or an irony here on maybe both.

Mr. DOERNBERG. I am sorry if I misled the Chair. I did not mean to suggest that computerization itself exacerbates the problem. It makes it easier to identify the problem because of the relative in-

crease in speed in which records are handled. Computerization by itself does not make the problem worse.

Senator MATHIAS. Well, I did not know if you were suggesting that it had been fully done, that errors were creeping in in the programing process or what.

Mr. DOERNBERG. Well, one of the things I wanted to mention is that from my own experience, our problem is not with the technology. The technology is fine. Our problem is that at the end we rely on people to put the data into the system.

We do not yet have a system that reaches out and grabs data, if you will. The problem is that the people in the criminal justice system do not put the data in. We have not found substantial problems with the systems themselves once the data are inserted into them.

It has not seemed to be a problem, and in that respect, I am not at odds with what OTA suggested.

The one reservation I have about the OTA report in this respect is that it talks about record quality and it talks about audits in the States, but it does not tell us specifically how the audits are done. This is a major area of concern.

When we did our national survey in preparation for writing the article, which I submitted to the committee, we asked the States how they did audits, if they did them at all, and many of the States said, we do them by internal consistency checks; that is to say, we take a particular rap sheet entry and we make sure all the data elements are there, but we do not check them back against the original court records.

And with all respect to their good intentions, which I do not doubt of the people running those systems, it is a little like balancing your checkbook by making sure that the stub is filled out without looking at the check to make sure that the amounts agree.

It is not a reliable system.

Senator MATHIAS. It should not be such a terribly difficult problem. When I go to the Safeway store and they run the loaf of bread and the box of crackers across a computer readout, it not only calculates my bill, but I am told it also reflects on inventory records automatically. It does several things at once.

If you can do that in the millions of complicated transactions in a grocery chain, you ought to be able to keep these records fairly easily and accurately.

Mr. DOERNBERG. That is correct, Mr. Chairman. I do not think that the problem should be as difficult as it has constantly been portrayed to be.

One of the things that would ameliorate the problem, as we have seen, would be to put computer terminals in the courtrooms themselves to that as the clerk of the court gets the papers——

Senator MATHIAS. Just like the checkout counter in the grocery store.

Mr. DOERNBERG. That is right, and given that computer technology is improving so much, and the cost is decreasing so much, the microcomputers are proliferating at the rate that they are, this is something which at least in the major jurisdictions in the large cities, even in the minor jurisdictions, that is the low volume jurisdictions, this is something that we ought to be able to do and faith-

ful entry of data at that point in the criminal justice process would certainly do much to solve their problems.

And one of the things I am compelled to observe is that it is a very selective problem with entering data that we have, because nobody has ever suggested that there is any great problem with getting arrest data entered.

The arrest data and the charges are entered routinely and no one complains of problems there. The problem is with entry of disposition data, and I think, frankly, Mr. Chairman, the problem is one not of technology but of motivation.

Senator MATHIAS. Well, that brings me to my last question to you, and that is that you did say that problems are on each side, and that there is some record of dissatisfaction on the part of prosecutors and of defense attorneys. I would salute the FBI because it has made some effort to address this dissatisfaction by establishing the Advisory Policy Board and I think that has yielded some benefits already.

But let me ask the same question that I asked the last witness, which is whether there ought to be a wider representation in the membership of the board.

Mr. DOERNBERG. I am not familiar more than the last speaker expressed with the exact membership of the board. Certainly I think wide representation is a good idea. That is to say, prosecution and defense agencies ought to be represented; civil liberties agencies should be represented; and I gather they are.

And I think that that is good. But I do not think that the problems lie with the advisory board. I think the primary problems have been that we have not had standards on a Federal level that have any real teeth in them, Mr. Chairman.

There is no bite, and unfortunately, the experience in this area is that if the agencies are not forced to perform at a high level, they do not perform at a high level, and I say that with no imputation of ill will or anything of the sort. I say it merely as an empirical observation.

Senator MATHIAS. A statement of your observation of human nature.

Mr. DOERNBERG. For whatever reason, Mr. Chairman, it does not happen. We all wish that it did. I think that the thing that heartens me about the committee beginning to take up the problem again for the first time since 1975 is that it sounds like we are going to stop wishing that they did and start trying to look for ways to ensure that they do.

Senator MATHIAS. Thank you very much for being here.

Mr. DOERNBERG. May I thank again the Chair for its patience and Professor Trubow for his flexibility.

Senator MATHIAS. Let me say that Professor Trubow is a graduate of this institution. He is familiar with all our problems here, and he well knows what one long ring means. I am going to have to excuse myself for a few minutes and go to the floor and vote. I will return immediately, hopefully not more than 10 minutes.

And so the committee will stand in recess briefly for about 10 minutes, depending on how fast I can walk.

[Whereupon, at 4:05 p.m. to 5:05 p.m., a recess was taken.]

Senator MATHIAS. The committee will come to order right after the longest 10 minutes you have ever experienced, and the Chair wants to express an apology.

What happened was that we had a rollcall vote on the latest compromise on the budget, after which the majority leader advised that he was going to recommit the whole budget issue to the Budget Committee and advised all members to stay on the floor.

We had decided whether that was going to require a rollcall. Ultimately, it did not, but that was part of the process that took so long.

So, please, Mr. Trubow.

Mr. TRUBOW. Thank you, Mr. Chairman.

I ask that my written statement be made part of the record, and I will make some extemporaneous comments here.

Senator MATHIAS. Your full statement will be included as part of the record.

I should add the fact that you have served as executive director of the Maryland Governor's Commission on Law Enforcement and the Administrator of Justice and as a member of the professional staff of this committee. That should all appear as part of the record.

Mr. TRUBOW. Thank you, Mr. Chairman.

You are very gracious, and it is nice to be back here.

In the letter from the chairman inviting my testimony, you asked that I talk about questions of access to criminal history record information, and I will comment with respect to that subject matter.

A problem we face in trying to develop a protocol for access to criminal history record information is that there are a variety of factors, many of them conflicting with respect to the circumstances in which there should or should not be access to nonconviction criminal history information.

Part of the problem arises from the fact that society itself has some of conflicting goals. One goal is to protect itself from people who have been offenders, and this would suggest, therefore, that criminal history information be fairly accessible.

On the other hand, society wants to rehabilitate offenders so that they can resume useful roles in the community and not be a burden on society; pursuing that goal tends to restrict access to information.

Additionally, there are constraints on information access arising from public policy in this country. Legal policy relates to the presumption of innocence that you spoke about before. Because of the presumption of innocence, a constraint on nonconviction information results; that is, if a person has on his record a simple arrest with no other disposition or if he has been found not guilty or if the criminal justice system has refused to proceed against him, that reinforces the presumption of innocence, and there should be no access to that nonconviction criminal history information.

A second constraint arises from a policy of forgiveness, and this relates to conviction information. Even when there has been conviction for transgression, society may allow forgiveness, and what this means is that certain conviction information should be inacessible. For certain offenses, misdemeanors, or even some felonies,

after a specified period of a clean record the information may be sealed or purged so that a person can be considered forgiven for the transgression.

Now, what this boils down to——

Senator MATHIAS. Let me interrupt you there.

We had a well-known case here not too long ago, including one of the most distinguished officials of Government, a man who had held three successive Cabinet posts. Senator Kennedy used to say that the neighbors in Virginia used to watch which limousine drove up before the house every morning to know of which department this man was going to be the head. Yet, he had a youthful college indiscretion on his record that was regurgitated every time the President nominated him for some high office.

Is that the kind of thing you mean?

Mr. TRUBOW. Yes.

Senator MATHIAS. I am not trying to put words in your mouth; I am just trying to visualize the kinds of situations that might come up.

Mr. TRUBOW. It is not unusual for States to limit access to conviction information in such cases as first and only offenses committed by young people, or matters which are sometimes considered political offenses, such as demonstrations and sit-ins which may have resulted in a criminal conviction.

But for forgiveness might include more serious offenses, if there has been a clean record for a reasonable period of time. Society may forget about the old crime and pay attention to the good conduct now.

These various notions lead me to several policy conclusions regarding access to criminal justice information.

Final, I hesitate to limit access by the criminal justice system to any criminal history record information. I believe that criminal justice agencies ought not be impaired in their ability to do their job. Although arguments can be made that certain kinds of CHRI may not be necessary for the criminal justice system to do its job, I think that that is not the major problem.

I think the major issues involve access for noncriminal justice purposes such as employment, licensing, or credit checks. I believe that from the standpoint of protection, if we are talking about the need to protect society, access to nonconviction criminal history information is not really important. I think that there should be no access to nonconviction information for noncriminal justice purposes.

If conviction information is desired to protect the public, then I want to consider the kinds of risks involved; risks to person, risks to property, or risks to confidential information.

The behavioralists have admitted—as the OTA report has noted—that they do not have much ability to predict future behavior based upon past criminal acts.

That is less so regarding crimes of violence. There seems to be more likelihood that crimes of violence may be repeated. Therefore, there is an argument that society's protection is enhanced if convictions for crimes of violence are available.

With respect to crimes against property, we are talking about risks that can be insured against, risks that can be covered by

bonds or other devices. Risks to information may involve breach of State security, a rather narrow and specific problem, or risk to confidential information—private or proprietary information. If a job involves access to State secrets, perhaps conviction information should be available for preemployment screening. But when the risk is to property or confidential information it is very difficult to understand when conviction information is useful. Consequently, whenever we do not have a fairly clear understanding of the risk that will result by employing a person without checking his criminal convictions, I opt for confidentiality of the information.

The OTA report accurately indicated that the States are all over the ballpark with respect to how they limit access to information. My own studies and surveys support that conclusion, and I feel very strongly that there is a need for Federal legislation in this area to establish some national standards.

I bring to the chairman's attention the fact that the National Conference of Commissioners on Uniform State Laws is currently in the process of drafting a uniform criminal records act. I am the reporter to that drafting committee, and I think that that activity by the NCCUSL indicates the need for uniformity. I think that effort can complement Federal legislation, because the uniform State law can fine tune and standardize for implementation by the States, but the general policy with respect to criminal justice information can and ought to be established by Federal legislation.

I believe that a policy board will be needed to oversea such legislation, and I believe that the States should have a significant role to play in the policy board, and public interest groups should be included so that we do not lose sight of the privacy interest of the individual.

Senator MATHIAS. Let me ask you, with regard to your last recommendation that there should be standardization, are you thinking of access or are you thinking of quality or are you thinking of both?

Mr. TRUBOW. Both, sir.

Senator MATHIAS. Diversity of State information law conflicts with one of the main justifications for an interstate exchange system, that is, some sense of completeness. If you get an inquiry from the licensing board of State A about a criminal record of an applicant, it may produce a response from State B, whose laws permit the release of the information requested, but no response from State C, even though State C has essentially the same information that State B did.

So the State originally making the inquiry will make a decision based on incomplete information, not because the information is not there, not because it is not in the system, but because there are different criteria for releasing it.

So I suppose my question is: in this case, is half a loaf better than none?

What is your feeling about that kind of conflict?

Of course, if we go the standardization route, I assume that sort of problem would be relieved.

Mr. TRUBOW. Although I am inclined to agree that half a loaf is better than none, as you phrased it, it will take the NCCUSL a couple of years to complete its uniform act, and it might take the

Congress a couple of years to finish its inquiry and legislative process. In that period of time, I think we may see more uniformity in policies at the Federal and State level that may help to alleviate the problem.

Senator MATHIAS. You have recommended a hands-off policy on the collection and dissemination of intelligence.

Mr. TRUBOW. Yes, sir, I did.

Senator MATHIAS. What about the use of the criminal justice information systems for intelligence purposes?

Maybe I ought to be a little more exact in that question. The incorporation of a Secret Service file has already given rise to some controversy.

Do you see any privacy implications in the FBI-Secret Service arrangements?

Mr. TRUBOW. I certainly do, and intelligence and investigative information is a very, very difficult problem because of the very nature of the information and how it is kept.

At one time I thought the best way to deal with the matter is simply to prohibit such information from being put into automated data bases, but I do not believe that that is a feasible choice in the long run.

I believe that the national organized crime strike forces, for instance, have put some of the information they use on automated data bases in order to do their job on a national scale. It would take a lot of work by people skilled in the intelligence information area to develop an intrastate automated intelligence information data base.

I do not believe that we know how to regulate intelligence and investigative information because of the complexities in the way it is collected and maintained, and that is why I say we should leave it to the experts in the criminal justice community to make decisions on the use of intelligence information within their own environment.

That position invites criticism, I know, but I have not seen any workable suggestions for the regulation of intelligence information that will not result in more threats to privacy rather than less.

Senator MATHIAS. Let me go back to the question I asked about standardization. Should that also include expungement?

Mr. TRUBOW. My answer is yes, but the way I would treat that is not by about expungement as such, which technically means the destruction of information. Many State law enforcement officials, for instance, tend to blanch at the notion that information should ever be irretrievably destroyed.

I think in terms of removing certain information from active files, sealing it, or putting it away so that in specific circumstances there could be access to it, but it would not be available on a day-to-day basis.

Senator MATHIAS. One last question. Now, you testified that you have some doubts, that you are unsure of the benefits that can accrue from noncriminal justice access, yet the President's Task Force on Victims of Crime has recommended that employers, teachers, and other people who work with children ought to have access to records of sexual assault, child molestation charges, that kind of thing.

Mr. TRUBOW. That is the area, Senator, as I mentioned, when we are talking about risks of violence to persons. The evidence seems to indicate more of a propensity for offenders to repeat that kind of offense. There can be good reasons for access to conviction information in the circumstances you mention, I believe.

Senator MATHIAS. Well, we are very grateful to you for your testimony, and I personally am grateful to you for your patience.

I would make the same request that I did of the FBI witnesses. Would you be willing to respond to some further written questions as we review the record?

Mr. TRUBOW. Indeed, I would, Senator, and in departing I might underline a comment I made in my written testimony.

I am delighted the committee is looking into privacy questions with respect to criminal histories. I hope that you also set OTA about the business of doing similar work with other kinds of information that will present significant problems to society and to Government in the future.

Senator MATHIAS. OTA does not seem to find difficulty in keeping busy, but we will press them where we can.

Mr. TRUBOW. Thank you for the invitation to be here.

[Submissions of Messrs. Trubow and Doernberg follow:]

Prepared Statement of George B. Trubow

It is a special pleasure for me to have been invited to testify at this hearing. I worked for the Judiciary Committee about 15 years ago as Deputy Counsel to its then Subcommittee on Improvements in Judicial Machinery, and I enjoy being back for a visit. Also, the subject matter of the hearing, a national computerized criminal history record system, is a matter with which I have been concerned for some time. In the late 1960s, as the first Executive Director of the Maryland Governor's Commission on Law Enforcement and Administration of Justice, I represented the state in a consortium of six states that was the foundation for the SEARCH project, an experiment in the interstate exchange of criminal histories. In the early 1970s, I was with the Law Enforcement Assistance Administration of the Department of Justice, first as Deputy Director of the Office of Law Enforcement Programs and then as Director of LEAA's Office of Inspection and Review. Support for the improvement of record-keeping capabilities in the criminal justice system was a high priority for LEAA. Later, as General Counsel to the Committee on the Right to Privacy in the Executive Office of the President during the administration of Gerald R. Ford, I worked in behalf of federal legislation for the regulation of criminal histories, though unfortunately the legislation was not passed. Since 1976, I have been Professor of Law at The John Marshall Law School of Chicago where I teach Information Law and Policy, and Computers and the Law. Recently I was appointed Director of the Law School's newly established Center for Information Technology and Privacy Law. I am accutely aware of the possibility for dramatic changes to social, economic and political systems in the United States because of our current "information revolution." I am especially concerned about the interests of the individual about whom personal information is being gathered, stored, manipulated and disseminated in quantity and quality never before possible or contemplated. Criminal history information is an important part of the growing mass of personal information residing in federal, state and private sector data banks.

The focus of today's hearing is the report of the Office of Technology

Assessment, "Alternatives for a National Computerized Criminal History System." I take this opportunity to compliment OTA on a most thorough and thoughtful study which carefully presents the background, practices and issues for consideration in implementation of a national criminal history record information system. That excellent assessment is so comprehensive that it enables me to present a relatively brief statement before this Subcommittee because so much information is already before you in the OTA report. After my brief statement, I will be happy to discuss whatever questions you may have in connection with the subject of the hearing.

My statement will focus on issues of privacy and information policy in connection with the regulation of criminal history record information (CHRI), since that topic was especially emphasized in the Chairman's letter of invitation to me. In addressing CHRI, I use the definition which is conventionally accepted by the criminal justice community and contained in the OTA report, i.e., information concerning an individual's arrest for violations of criminal laws, the disposition of charges, and information on sentencing, correctional supervision, and release. The definition excludes intelligence and investigative information, which I do not believe should be the subject of federal legislation. Intelligence and investigative information is highly subjective, sensitive and largely unverified; I do not believe we know how to regulate such information legislatively and I believe it is best left to the management of criminal justice agencies authorized to collect and maintain such information. In taking this position I do not overlook the need to be watchful in monitoring the criminal justice system, especially with respect to the utilization of highly sensitive information. The law enforcement agencies must operate in accord with the principles of fairness and justice that have long been the bulwark of this nation, but I do not believe the way to achieve that goal is through tinkering with the regulation of intelligence and investigative information.

I will leave it to others to discuss questions regarding the operation of a national criminal record system and the many complex questions of information technology that are involved. Technical experts are in a far better

position than I to address such matters, and excellent materials on the subject also appear in the OTA report.

Another matter upon which I will not dwell involves the question of record quality. Criminal history records should be accurate, complete and timely if their use is to be reliable and safe. I know that the maintenance of record quality has been a problem in the criminal justice system, though I am aware that improvement is being made in disposition reporting. My discussion assumes adequate record quality; in doing so I know I assume too much but I do not want questions of record quality to distract attention from privacy policy issues.

My discussion will be directed to non-criminal justice access to criminal history records. My own bias is to accept the notion that criminal justice agencies should have access to all criminal history record information included in a national computerized system. Though arguments can be made that in some instances criminal justice agencies may not need access to CHRI, I simply acknowledge and turn aside those observations. We must trust and support the criminal justice system in pursuit of its efforts to control crime and delinquency. I believe that restrictions on information access by criminal justice agencies may impair their effectiveness, and they already have enough problems in trying to deal with a staggering crime rate.

In examining privacy and information policy with respect to CHRI, it is important to appreciate two conflicting objectives with respect to criminal offenders. On the one hand, society desires to protect itself from further risks at the hands of previously convicted offenders, and this desire encourages access to and dissemination of CHRI. On the other hand, society wants the rehabilitation of offenders so that they can return to a productive role in the community, thus relieving society of the burden of supporting offenders and their families. The pursuit of this objective results in restriction on access to and dissemination of CHRI. In framing an information policy, how do we accommodate those conflicting objectives?

As the OTA report has indicated, even the experts do not have much ability to predict future behavior based upon past criminal conduct, and we do

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not have sufficient insights regarding the kinds of employment risks that may grow out of previously detected criminal behavior. But, we do know that the fact of a criminal record is a serious deterrent to future employment possibilities, and the OTA report has noted numerous studies and evaluations which support that conclusion. Accordingly, in the difficult balance between access and nondisclosure of CHRI, my bias is to opt for nondisclosure in cases where arguments for each side of the access question appear to be equally persuasive. As to non-criminal justice uses of CHRI, I am unsure of the benefits that may accrue to society from disclosure of CHRI, but I am fairly certain of the burden on an ex-offender that may result from dissemination of such information.

As a starting point in shaping policy for the management of CHRI, I begin with a presumption of openness, that is, except with respect to intelligence and investigative information, I believe that CHRI generally should be open to the public. There are, however, two major constraints that militate in behalf of the restriction of access to certain kinds of CHRI.

The first constraint results from the presumption of innocence which is protected by our Constitution and which I believe is important for a free society. The result of this presumption is that non-conviction CHRI should not ordinarily be open to the public. I define non-conviction CHRI as the notation merely of an arrest unaccompanied by any further reported disposition, or dispositions recorded in behalf of the accused. Indefinite continuance, dismissal of charges or a finding of not guilty, are examples of non-conviction CHRI. The reason for nondisclosure because of the presumption of innocence is that the presumption is not rebutted simply because a police officer arrested a person in circumstances wherein the criminal justice system appears to have ignored that arrest and does not proceed against the suspect. If the system does proceed against the accused and he is found not guilty, then the presumption is reinforced and certainly there is no reason to disclose that information.

A second constraint on the disclosure of CHRI results from the notion of forgiveness. In support of rehabilitation, society may "forgive" an individual for certain past transgressions by keeping conviction CHRI confidential. Forgiveness

can be demonstrated either by nondisclosure of certain petty offenses, and by sealing the conviction records for more serious offenses after the expiration of an appropriate "clean record" period. In some states violations of ordinances and minor misdemeanors are not even reported to the central CHRI repository; this is one way in which forgiveness can be demonstrated. I believe that a sound CHRI management policy should incorporate this kind of constraint.

Opponents of any restrictions on CHRI often argue that nondisclosure is an attempt to "rewrite" history by denying that an event occurred. That observation is simply not correct and begs the question. The policy issue to be determined is what information about recorded events should be made public, and the confidentiality of selected historically correct information is not a new or radical notion.

Is federal legislation regulating management of a national CHRI system desirable? My answer is an emphatic yes. That was my opinion when the Congress considered federal CHRI regulation a decade ago, and that is even more firmly my opinion today as the computerization of CHRI makes such information increasingly available. My own studies, and others, some of which are reflected in the OTA report, indicate that there is a great diversity of criminal records management practices throughout the states. Intrastate as well as interstate exchanges of CHRI should be treated with uniformity to assure the validity of such exchanges. I am currently Reporter to the Uniform State Criminal Records Act drafting committee of the National Conference of Commissioners On Uniform State Laws. The launching of that project is recognition by the NCCUSL that a uniform state policy in criminal record management is advisable, and the development of a uniform state act will support and compliment federal legislation. I sincerely hope, Mr. Chairman, that you and your colleagues introduce and enact legislation to establish a national policy governing the management of the CHRI data base.

As to the content of federal legislation, there are many good models available with which to begin, and it certainly will serve no useful purpose for me at this time to comment on specific details of possible legislation. The OTA

report documents the excellent efforts by the SEARCH Group, and others, with respect to standards for federal CHRI legislation. In my opinion the issues are relatively well defined, manageable and in need of attention.

A national CHRI system must have oversight. As the OTA report indicated, federal-state relations have been perceived as a problem, and the lurking fear of "Big Brother" will loom larger as we prepare to revisit George Orwell's "1984." We recall that the major threat to society in "1984" resulted from constant surveillance accomplished by ever-present television cameras and eavesdropping microphones. Orwell did not foresee information technology which can effectively provide surveillance by monitoring the flow of vast quantities of personal information passing through the endless networks being developed in the public and private sector. Accordingly, I believe that an independent policy board should be established to monitor and audit the functions of any national CHRI system. I believe that such a board should itself be dominated by state representatives since that interest is paramount in a national CHRI system. Public interest members should be included as well so that law enforcement priorities do not completely occupy the board's attention.

In closing, permit me to digress for a moment. Mr. Chairman, it is not only CHRI which needs a national focus. The much broader problem of policies to deal with the ever-increasing data base of sensitive, personal information cries for Congressional attention. I believe that OTA can be a focal point to stimulate a national interdisciplinary dialogue seeking to balance the legitimate needs of government, the private sector and society against the extremely important individual interest in personal privacy. I am aware that the Chairman and others on the Judiciary Committee are members of the OTA Congressional Board, and I hope that OTA will be commissioned to undertake assessments and studies in other areas of information policy. In a society of computers and numbers, protection of the individual becomes incredibly important. Information technology can contribute immeasurably to the quality of life, but this ought not and need not occur at the expense of personal integrity.

Thank you for this opportunity.

FOLLOW-UP QUESTIONS AND ANSWERS

Question 1. Given the admitted problems of record quality particularly with regard to disposition reporting, should non-criminal justice access to the interstate system continue to be prohibited unless and until the quality of criminal history records reaches an acceptable level nationally? In this context, what level would be acceptable?

Answer. Regardless of record quality, non-criminal justice access to an interstate criminal record system should be restricted, especially as to disclosure of non-conviction information. Failure of an agency to report dispositions in timely fashion means that conviction and non-conviction information both may fail to appear on an individual's current record. I believe the individual should be given the benefit of doubt, and arrest information without a disposition reported after a year should be treated as non-conviction information.

Question 2. You say that "we should keep our hands off" the regulation of intelligence and investigative information, and "leave it to the experts in the criminal justice community to make decisions on the use of (such information) within their own environment." This is basically what has happened over the last several years with regard to intelligence information and the NCIC. The FBI recently reversed its long-standing opposition to such uses, and inaugurated a Secret Service "dangerous persons" file within NCIC. You indicated that this system had privacy implications. Are those implications specific enough for you to make a judgment on whether Congress ought to continue its "hands off" policy in this area, or whether standards ought to be legislated for intelligence use of the NCIC?

Answer. I do not believe that intelligence or investigative information should be available on an interstate CHRI system. The characterization of anyone as a "dangerous person" may be appropriate in connection with "wanted person" information, but otherwise is without justification in an interstate CHRI system.

Question 3. What restrictions do you think ought to be imposed upon retention or redissemination of information exchanged between States using the Interstate Identification Index System? How would such restrictions be enforced?

Answer. The problem arising from the secondary disclosure of information exchanged between states shows a need for uniformity in state law regarding criminal justice information. Federal legislation or regulation can set a minimum standard, though the states should be free to adopt a more restrictive protocol if they so choose.

When states afford differing measures of privacy protection to criminal justice records, initial dissemination of the information should be pursuant to the disclosing state's policies and restrictions. Subsequent disclosure by the recipient state should be in accord with the recipient state's policies.

Question 4. As discussed at the hearing, current Federal practice is to make arrest data, even if lacking in disposition data, available to Federal agencies for pre-employment security checks, as well as to criminal justice agencies. Do you think that this is a proper use of such data?

Answer. The current federal practice discussed at the hearing is essentially a non-criminal justice use of criminal history records, and should be subject to the same restrictions as apply to state government and the private sector. Consistent with my response to your first question, non-conviction data generally should not be available to Federal agencies on determining whether to employ an individual. A proper exception to this rule would be where the employing agency shows a need to know the information because of the special sensitivity of the particular job for which an applicant is being considered. Jobs which by their nature involve an unusual personal risk to others would be candidates for such an exception.

Question 5. The Federal Youth Corrections Act includes a provision (18 U.S.C. 5021) for convictions thereunder to be "automatically set aside" upon the release of a youth from supervision. Federal courts generally order the record of such a conviction sealed after the conviction has been set aside. The Administration has proposed repeal of the Youth Corrections Act, including the "set-aside" provision which has been the basis for the sealing orders. At present, convictions under the Youth Corrections Act are among the few Federal convictions which are routinely sealed at some point.

In view of the "forgiveness" principle to which you refer in your testimony, and in view of other policy considerations affecting young offenders, do you think that the statutory basis for the Youth Corrections Act sealing procedure ought to be eliminated?

Answer. Whether or not a conviction is "automatically set aside" under the Federal Youth Corrections Act, the sealing of such a record may be appropriate in

accord with a principle of "forgiveness." It would also be appropriate for the seal on a FYCA conviction to be removed when the individual involved is convicted of a criminal offense as an adult.

PREPARED STATEMENT OF DONALD L. DOERNBERG

Introduction

I am pleased to have the opportunity to appear this morning before this Subcommittee to testify about problems posed by computerized criminal history information and federal involvement with them. Before setting out the areas on which I think the Subcommittee should focus, I should give the Subcommittee a brief idea of my own involvement in this area.

In 1975, I was assigned as trial counsel to litigation of an action in the Southern District of New York concerning New York State's computerized criminal history information system. Specifically, The Legal Aid Society, for which I then worked, asserted that the reports generated by that information system, commonly referred to as "rap sheets," were inaccurate, incomplete, ambiguous and contained much irrelevant but harmful information, all of which combined to produce the result that many of Legal Aid's clients spent more time in jail than was their due under the law. During the course of that litigation, we undertook a thorough statistical study of the quality of the data in the New York system. The results of the audit astonished even me, and I had been cynical about the system's performance at the start. In a capsule, we discovered that approximately 27% of the cases listed by the system had disposition entries listed which were complete, correct and unambiguous. The remaining 73% were defective in some respect, and yet New York rap sheets are used in thousands of cases every day, having a direct impact on whether the thousands of people whose cases they affect are at liberty or incarcerated. I will discuss the data a bit more fully below. The complete data from the audit are reproduced in Doernberg & Zeigler, Due Process Versus Data Processing: An Analysis of Computerized Criminal History Information Systems, 55 N.Y.U. L. Rev. 1110, 1155-64 (1980), which I annex to this statement for the Subcommittee's convenience. Suffice it to say at this point that the Southern District of New York accepted our findings in toto and incorporated the major findings in its opinion, which granted the plaintiffs substantial declaratory relief and, in the process, catalogued some of the constitutional violations which such record-keeping systems engender. The court's opinion, Tatum v. Rogers, 75 Civ. 2782 (S.D.N.Y. February 16, 1978), is not published, so I append a copy to this statement. The defendant did not appeal the court's decision.

Looking back on that litigation[1] and the research Professor

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1. It is difficult to look back on the Tatum litigation because it is still going on. Despite the clear findings of the court against the defendant, and despite his decision not to appeal the judgment, the agency continues to resist implementation of the remedies which the court designated. The result has been an additional five years of litigation in an [Footnote 1 continues on following page]

Zeigler and I did following the litigation in preparing our article, four areas of concern were highlighted which I would like to address today: problems of completeness and accuracy of data, the effects that sloppily compiled and recklessly disseminated data have on the criminal justice system, the essentiality and relatively low cost of doing proper audits and, with all respect to this body, Congress' entire failure properly to regulate such systems, which are heavily financed by funds provided by the federal government. There are, as well, issues of privacy, security and access to the information in such systems to which the Subcommittee should devote substantial attention. These are important areas; I do not go into them only because the Subcommittee will no doubt be addressed on those issues by other speakers, and I do not want either to be duplicative or to give too little attention to the areas with which I am most familiar.

Accuracy Problems

Some refinement of the Tatum data is important so that the Subcommittee can understand the complete breakdown of the New York rap sheet system. In addition to the general findings I have mentioned, the court found that in 45% of all cases where dispositions had occurred, the system entirely failed to report the disposition.[2] In addition, 8% of the cases had entries which were incomplete,[2] 10% had entries which were ambiguous,[3] and fully 9% had entries which were simply wrong.[4] This is not a performance of

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[Footnote 1 continued] effort to force New York's rap sheet agency to live up to the standards of due process of law described in the court's opinion.

2. Incomplete entries lack full information on convictions. For example, the rap sheet may indicate conviction of an attempt without stating the crime attempted. Arguably, it is relevant to know whether an individual was convicted, for example, of attempted grand larceny (a basically nonviolent crime) or of attempted armed robbery. Rap sheets also may indicate a sentence without listing any conviction charge or level at all.

3. Ambiguous entries showed information in the disposition column in such a way that users were unable to infer what actually was meant to be conveyed. This disability extended even to the official of New York's system in direct charge of the rap sheet division, who could not himself deciper many of the entries on his own product.

4. The study included four types of inaccurate entries: (1) the basis disposition is incorrect (conviction listed for dismissal or vice versa), (2) multple listings indicate a plea to more than one count when there was a plea only to a single count, (3) sentences are recorded incorrectly, [Footnote 4 continues on following page]

which any system operator should be proud.

In the course of publishing the article referred to above, Professor Zeigler and I conducted a national survey to see whether the data we had gathered concerning New York were typical. To our dismay, we found that New York does seem to be representative of the problems which are experienced with computerized systems of this type. The survey results are summarized in the article at pages 1164-73 and are reproduced in their entirety in Appendices A, B and C. The Subcommittee should note that we surveyed rap sheet users as well as their producers. Curiously, the users regularly characterize the quality of the data as far worse than do the agencies charged with producing, maintaining and disseminating criminal history information. In rare agreement, prosecutors and defense agencies alike feel that the rap sheet agencies have failed properly to do the job to a much greater degree than is evident from the comparatively rosy picture painted by those whose work is being reviewed.

One of the plaints often heard from rap sheet agencies about the quality of their data is that the job of setting things right is so large as to be impractical. It is important for the Subcommittee to bear in mind in this respect that the reason the job is so large is that the agencies have done so little for so long, and have spent millions of federal dollars doing it. At this point, there is little question that cleaning up these systems will be expensive and time consuming. It clearly is harder and more costly to do the job right than to do it wrong. The cost of not doing the job, however, is even greater, because it means that the criminal justice system will continue to attempt to function with data whose quality is truly appalling.

Effects of Rap Sheet Data

To understand the effects these data have, one must understand the pervasive role they play in the decision-making processes of the criminal justice system. It is no exaggeration to say that rap sheets are used at all stages of the criminal justice process, from initial intake of a suspect to final discharge of a convicted defendant. Police may use rap sheets to decide whether to

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[Footnote 4 continued] and (4) the original conviction is correctly listed but a reversal on appeal is not shown. At the time the Tatum audit was done, New York had no system for reporting appellate results, and it still has none. Errors of the fourth type therefore occur whenever conviction is reversed on appeal. Because of limited resources, only trial court data could be collected in the Tatum audit, and inaccuracies of the fourth type are, therefore, not included in the statistics. The inaccuracy figure therefore should be somewhat higher than is indicated in the audit.

make certain arrests or to focus their attention on certain people as suspects. Prosecutors use rap sheets to determine what charges to file, what pleas to offer and what bail to request the court to set. The courts use rap sheets to assist in setting bail and in sentencing. Correction and probation officials use rap sheets to determine the level of incarceration and the timing of parole.[5]

The concrete effects of rap sheets' use were explored during the Tatum litigation. The dominant effect of the sheets is at the bail proceeding. Testimony at the Tatum trial showed that district attorneys routinely make applications for high bail based upon arrests showing up on a defendant's rap sheet with no disposition, even though some or all of those arrests may have resulted in no adjudication of guilt. Judges routinely set bail higher than they otherwise would because of such entries. In short, because poorly compiled rap sheets exaggerate the seriousness of defendants' prior involvement with the criminal justice system, bail is set higher than it otherwise would be. In turn, because so high a percentage of criminal defendants are indigent, they are unable to make the bail set, and the end result is that thousands spend more time in jail than they would if their rap sheets presented a true picture of their prior activity.

There is, I suspect, no defense attorney who has not faced the situation I have described above. Incidents of this type are so commonplace that they do not even excite individual comment today. There are two more concrete examples of rap sheets failing to do the proper job to which I wish to call the Subcommittee's attention. Several years ago, I represented a young man in a prosecution for possession of a minor amount of marijuana. During the proceedings, a judge mistakenly issued a bench warrant for the defendant, a mistake occasioned by the judge having told me and my client that the adjourned date was the 10th of the month, but having written it on his calendar as the 3rd. The mistake was cleared up on the 10th, when we appeared, and the warrant was promptly vacated. The case concluded. Two years later, my client was stopped for a minor traffic offense. The police officer checked with the National Crime Information Center's computer to see if my client was wanted. Although the judge in the marijuana case had vacated the warrant, somehow it still appeared as a warrant on the computer, but with the notation "CW." CW was supposed to mean "cancelled warrant," but the information was confusing to local officials, so my client was arrested on the "warrant," even though it had been issued by mistake and subsequently vacated, and despite the fact that retention of any information about it was irrelevant to any legitimate law enforcement concern. That night, convinced that that mistake would haunt him for the rest of his life, my client hanged himself in his cell. He was

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5. A more complete discussion of the use of rap sheets in the criminal justice process appears in the article at 1183-87.

twenty-one. But for law enforcement officials' failure to keep their system up to date, factual and relevant, he would not have been there at all.

Several weeks ago, we all had another demonstration of the power of rap sheets and their capacity to inflict irremediable harm. Following a murder trial in Virginia, the jury was given the job of considering whether the defendant should be executed. As part of the process, they were given information from the defendant's rap sheet. The jury recommended the death sentence, and the court imposed it. Some of the data from the rap sheet were later discovered, in the words of the assistant attorney general, to be "seriously misleading and or defective." That discovery caused the state to be in the unusual position of moving to vacate the death sentence. But for that discovery, the defendant might well have been executed because of misinformation conveyed by his rap sheet.[6]

Wholly apart from one's philosophical perspective on capital punishment, it is not difficult to argue that no person should run the risk of being executed because of erroneous information. And, it requires no great leap of logic to assert that no individual should be asked to pay any penalty or suffer any loss on the same basis. Yet that is the result that occurs daily in hundreds of courtrooms across the country because of rap sheets funded wholly or in part by the federal government. People go to jail, not because they have been adjudicated guilty of crimes and deserve to be incarcerated, but because they are unfairly tarred by the product of computerized criminal history information systems and condemned to imprisonment on the basis of incomplete, inaccurate or ambiguous information.

The Necessity of Audits

One of the other discoveries Professor Zeigler and I made during and after the Tatum trial is that it is neither terribly difficult nor unreasonably expensive to do a proper audit. Exclusive of the time which Professor Zeigler and I spent on the project, the audit cost approximately $12,000. It involved taking a sample of rap sheets and comparing the entries on the rap sheets with the original court records to see whether the rap sheet entries properly reflected the dispositions of the cases. I respectfully urge the Subcommittee that this type of audit procedure is the only one well calculated to give reliable data on accuracy and completeness. To my knowledge, no jurisdiction now conducts audits of this type on any regular basis, and, in fact, I am unaware of any jurisdiction having ever conducted an audit of this type.

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6. The story reporting this incident appears in the New York Times of April 20, 1983, at A21, col. 1.

What some rap sheet agencies do, as reflected in the Office of Technology Assessment's An Assessment of Alternatives for a National Computerized Criminal History System (October, 1982), is to do some sort of internal (to the rap sheet computer system) consistency check for various entries in the data bank. That is, an "audit" is performed to see whether recorded information is internally consistent and whether required data elements are all present. No comparison is routinely done with the original court records to see whether the information recorded is actually correct, and there is no on-going monitoring program designed to insure that charges are not allowed to be reported with no dispositions long after the cases have in fact been closed. The OTA report is not as clear as it should be on the methodology of the audits which it reports on page 104, but based on my experience in the area, this is the type of audit the report is talking about.

Both my own experience with the New York system and the information I have received from users of other states' systems leads me to conclude that the types of "audits" now conducted by state rap agencies are nearly useless as devices to insure completeness and accuracy in rap sheets. Moreover, audits conducted by the agency whose product is being audited are notoriously unreliable; bureaucrats tend to see their systems through rose colored glasses. In the Tatum litigation, just after plaintiffs had proved that the New York system was 73% defective, the Commissioner of the New York State Division of Criminal Justice Services testified that the defect rate was about 2%. This figure, of course, was not based on anything; the Commissioner had already stipulated that his agency conducted no audits whatever. Nonetheless, the incident is revealing, as is the wide gap in the national surveys Professor Zeigler and I conducted between state agencies' perceptions of their product's quality and the users' estimates.

I suspect that no data system can function properly without periodic, detailed audits performed by disinterested auditors. Certainly there is considerable evidence that computerized criminal history information systems cannot. One of the key items to which this Subcommittee should turn its attention, if it is serious in its concern about the quality of criminal history data being disseminated and used in the criminal justice system, is the problem of insuring that useful, effective audits are performed on a routine basis.

Congressional Involvement

The Committee on the Judiciary of the Senate has been involved with this area since 1974. Unfortunately, and with all due respect, the record of Congressional activity in this area is a record of failure. As detailed in the article I have submitted, Congress has poured untold quantities of money into the development of computerized criminal history information systems. It has not, however, made any substantial effort to insure that the data in such systems are complete, accurate, relevant and not misleading.

I am aware, of course, of the regulations at 28 C.F.R. §§ 20.1 et seq. and the standards which they purport to set. I respectfully suggest, however, that the standards are no standards at all, and that the times for compliance with the regulations have so routinely been moved back and back and back that they are not any longer regarded seriously either by the state agencies theoretically bound by them or by the federal government itself.

For example, 28 C.F.R. § 20.21(a) requires that criminal history record information be complete and accurate. There is, however, no way to know whether such information is complete and accurate without performing audits. Audits are required by 28 C.F.R. § 20.21(e), but the components of a proper audit are not spelled out. The result is the sort of useless internal consistency check I have previously described. States do not do full-scale audits of their rap sheet systems; they are in no position to certify that their systems are operating at any particular level of efficiency.

One of the reasons the federal regulations seem not to have been seriously enforced is that every time a deadline approaches, the states wail about how immediate compliance would wreck their information systems, and the deadline is postponed. The "parade of horribles" approach is used to persuade the federal government that the streets will be overrun with criminals if rap sheet systems are held to any reasonable standards of accuracy and completeness. There is no disputing the nation's current problems with crime, but they are neither caused by nor subject to remedy from the use of computerized criminal history information systems which present misleading, incomplete and inaccurate data. One suspects that the real reason for the lamentations of state officials in this area is that to clean up the mess they have created with sloppy record compilation procedures is a Herculean task truly reminiscent of the Augean Stables. I urge the Subcommittee to consider that delaying attention to the job will only enable it to get worse. The ultimate result is that rap sheets become useless even for legitimate law enforcement purposes.

Congressional funding has had much to do with the proliferation of computerized criminal history information systems over the past fifteen years. In part, Congress' lavishing funds on such systems without proper supervision or imposition of real standards of performance has allowed them to grow unregulated. Congress has at least a moral obligation to begin now to redress the harm already done.

Conclusion

All of the available data indicate that the nation's criminal history information systems leave us little of which to be proud. So much of the information contained in rap sheets is either inaccurate, incomplete or improperly included that it is difficult to see how the criminal justice system can ever rely upon the product

and continue to function with integrity. Few things are as damaging to an individual as a prior criminal history. A sloppily compiled, inaccurate history containing some facts, some errors and many unproven allegations prejudices the individual's position before the law for the rest of his life. Moreover, it denigrates the legal system which allows itself to use materials of such poor quality.

This is a situation in which all of our legal system's pious pronouncements about the sanctity of due process of law and the importance of the presumption of innocence collide head-on with persistent government practices which defy the existence of those principles. We should not permit ourselves the comfortable delusion that the criminal justice process is made more effective or in any way ennobled by injecting into it false and incomplete data casting defendants in criminal cases in an undeservedly unfavorable light.

Today's criminal justice system functions largely through the plea bargaining process. In that context, all of the careful evidentiary protections developed over hundreds of years mean little except insofar as they exhort us scrupulously to insure that no individual is unfairly overwhelmed by the power of the government acting against him. Sloppily assembled and maintained rap sheets have direct, concrete effects in the criminal justice system. It is because of the pervasive use of rap sheet information that neither Congress nor the states should be permitted to slide by with a second rate job. After years of drift, it is time for Congress again to reassert its authority to require that systems funded with federal monies perform on a high level of competency and fairness.

FILED
U.S. DISTRICT COURT
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S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAMUEL TATUM, ALAN BOND, ROBERT CALHOUN, JOSEPH EASTER, JOSEPH LAWRENCE, GEORGE LOCKER AND EUGENE ROGERS, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

FRANK J. ROGERS, Commissioner of the New York State Division of Criminal Justice Services; and ROBERT J. McGUIRE, Commissioner of the New York City Police Department,

Defendants.

75 Civ. 2782 (CBM)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

#4823

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MICROFILM
FEB 20 1979

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action for declaratory and injunctive relief alleging constitutional and statutory violations by the New York State Division of Criminal Justice Services (DCJS)[1] in the performance of its authorized function, the collection and dissemination[2] of criminal histories pertaining to defendants appearing in criminal matters in the New York state courts.

This action was originally certified as a class action by order of the court dated November 29, 1976. Pursuant to its discretionary authority to reconsider the class certification decision at any time up to and including decision on the merits, Davis v. Smith, 431 F.Supp. 1206 (S.D.N.Y. 1977); Schaffery v. Winters, 72 FRD 191 (S.D.N.Y. 1976), this court is now of the view that the class should be decertified, on the ground that the class action mechanism is not superior to other available methods of handling the litigation. It is clear that even absent class certification, any declaratory or injunctive relief herein granted will run to all those who would have been members of the class. Galvan v. Levine, 490 F.2d 1255 (2d Cir. 1973).

The plaintiffs are individuals about whom criminal history information has been collected, stored, and disseminated either by the New York State Division of Criminal Justice Services or the New York City Police Department. The defendants are Frank J. Rogers, in his official capacity as Commissioner of DCJS, and Robert J. McGuire in his official capacity as Commissioner of the New York City Police Department.

The criminal histories produced by DCJS are essential tools in the administration of criminal justice in the state of New York. They are colloquially referred to as rap sheets.

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1 DCJS is a division within the Executive Department of the Governor's Office of the State of New York.

2 DCJS disseminates criminal histories to authorized recipients in the form of "rap sheets."

They are utilized by prosecutors, judges, probation personnel and police officers in the performance of their various functions throughout the criminal justice system. The gist of plaintiffs' claim is that the rap sheets are so inaccurate as to result in substantial prejudice to criminal defendants. Violations of the plaintiffs' rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, under Article I, §§2, 6, and 11 of the New York State Constitution, and under 42 U.S.C. §3771(b) and appurtenant regulations are alleged.

Findings of Fact

DCJS at the time of trial maintained criminal history information records on more than 2.5 million individuals. Those records are the data base from which DCJS produces rap sheets of individuals. DCJS receives Law Enforcement Assistance Administration funds for maintenance of its rap sheet system, as do several other state agencies. DCJS forwards arrest data to, among others, the Federal Bureau of Investigation (FBI). It is the primary New York supplier of such data to the FBI.

Since DCJS began keeping criminal histories, it has utilized three different systems for maintenance and organization of its records: a manual system, a semi-computerized system known as the "JC-500", and most recently, a fully automated system known as the "MEDITECH on-line disposition reporting system". The JC-500 system was in use when Mr. Faust, plaintiff's research consultant, conducted his study referred to infra in February and March of 1977. The JC-500 system was replaced in New York City in April of 1977; however, that system is still in effect as to any criminal histories which pre-date the replacement.

Defendants did not seriously dispute that the JC-500 system was less than perfect. To quote from their post-trial brief, the following observations were made of that system:

"One of its deficiencies was its lack of timeliness.

> "There would be great delays in reporting the information. The significant problems in the system were the delay in turnaround time in generating these forms and the failure to capture pleas at the arraignment. The Office of Court Administration decied to get rid of this system and replace it with what is known today commonly as the MEDITECH System or on-line disposition reporting system."

Under the new system, the timeliness of disposition reporting is substantially improved. Right after arraignment or after dismissal of a case prior to arraignment by a District Attorney, the information about what happened to the case is entered into a computer by Office of Court Administration personnel. Entry may take as much as a day if the caseload that day was significantly high. After entry into the computer, cases which have been concluded are verified by a person other than the one who entered the information. The information on the computer files is then displayed on a cathode ray tube connected to the computer and compared with the actual court papers. There is an individual comparison of all the information. Any errors or omissions are corrected. After the check has been completed, a random audit is done by drawing a representative sample of cases and rechecking the information. The information is not transmitted to DCJS unless the error rate is within statistically tolerable levels. The whole system is operated by court personnel under the aegis of the Office of Court Administration.

It is the Office of Court Administration's intention to expand this system beyond the City of New York into the six major metropolitan areas in New York State so that effectively 90 per cent of all dispositions which occur in the state will be reported through this type of on-line disposition reporting system. DCJS should thus be receiving all final dispositions within one week of their occurrence. By capturing the information at the time of the occurrence, the loss of information will be eliminated. The problem of the JC-500 system will be addressed by these major improvements in disposition collection in that unnecessary delays caused by procedural inefficiencies will be eliminated and dispositions will be captured not only

at arraignments but whenever they occur in a reasonably expeditious manner.

DCJS presently distributes criminal history information on three forms of rap sheets. The first form is a manual, typewritten form. These are being converted to computerized forms at the rate of approximately 45 per day. Approximately nine per cent of DCJS' rap sheets are distributed in manual form. The second and third forms of rap sheets are computer print-outs. With respect to virtually all forms of rap sheets, except where indictment precedes arrest, the charges listed for a particular arrest are those reported by the arresting officer or agency.

The statistical study conducted by plaintiffs' consultant, Mr. Faust, revealed the deficiencies of the JC-500 system to be the following:

1. Rap sheets failed to list any disposition data in approximately forty-five per cent of cases arising from 1973 up to the time of trial.

2. Rap sheets listed disposition data incompletely in approximately 8 per cent of all cases during the same time period. Incompeleteness included cases where sentences were listed without indication of the conviction charge, and where attempt convictions were listed without reference to the underlying substantive offense.

3. Rap sheets listed disposition data incorrectly in approximately nine per cent of the cases surveyed. Inaccuracies included absolute misreporting of conviction or dismissal, multiple listing of a single conviction, and incorrect sentence listings.

4. Rap sheets listed data ambiguously in approximately ten per cent of the cases surveyed, by use of listings indicating a combination of multiple charges into a single plea.

5. Rap sheets did not list appellate dispositions.

6. Rap sheets listed disposition data completely and correctly in approximately twenty-seven per cent of the cases surveyed.

7. In approximately forty-nine per cent of the cases surveyed, DCJS failed to report dispositions more than six months after they had occurred. Only one disposition in four was reported within sixty days of its occurrence.

8. Rap sheets always showed arrest charges, never showed formal charges, and only sporadically showed conviction charges correctly. Substantial differences exist between arrest charges as reported on rap sheets and actual case dispositions. Few cases are resolved by conviction of the highest level arrest charge. Most are resolved by conviction of a lower level charge (usually a misdemeanor or violation) or by dispositions favorable to the accused (approximately one-third of the time). Listing only arrest charges thus substantially exaggerates defendants' criminal records.

9. Cases which have been sealed, for example, in the case of youthful offenders, frequently appear on rap sheets.

10. Attempt offenses are designated by the particular substantive section of the Penal Law with the notation "-ATT" appearing after the designation. Arrest notations of such attempts are then confusingly listed in the charge column as the substantive offense itself. As a result, rap sheet notations of arrests for attempted crimes are often confusingly ambiguous.

DCJS must rely on Office of Court Administration (OCA) personnel to supply it with dispostion information and data concerning the issuance and status of bench warrants, and indeed, receives all of the data which it collects from other state agencies. DCJS has never applied to any court pursuant to New York Executive Law §837-b to require other agencies to furnish it with disposition data. DCJS takes the position that other State agencies cooperate with it sufficiently to enable it to perform its data gathering and reporting functions under New York Executive Law §837. This position is clearly unwarranted in light of the actual record of inaccuracy, incompleteness, and ambiguity in DCJS rap sheets revealed by plaintiffs' survey.

The individual asserting dispostion errors on a bail appli-

cation hearing, for example, is required to present corrective data, which ordinarily cannot be secured and presented immediately upon the discovery of errors at such a hearing. The evidence at trial established that it is customary for the District Attorney's Office in New York County to make bail applications based upon the number of prior arrests of a defendant rather than the number of prior convictions. DCJS requires the individual subjects of rap sheets to identify and correct errors in its files. At the time of trial, DCJS did not itself undertake to correct even those errors which were called to its attention. DCJS does not undertake to correct internal inconsistencies in rap sheet entries.[3] Plaintiffs complain that statutory challenge and review procedures may take a period of weeks to initiate and longer to resolve.

There are several programs presently in existence in the Office of the District Attorney of New York County which rely upon information provided by the rap sheets about which plaintiffs complain. The Early Case Assessment Bureau is a case tracking system designed to evaluate cases reported to the New York County District Attorney's office as felonies and to prescribe how the cases will be handled by that office. Rap sheets are relied upon in making tracking decisions. In making Early Case Assessment Bureau evaluations, rap sheets are used as transmitted from defendant Rogers, without any effort at verification. In evaluating rap sheets, the District Attorney's office presumes that arrests with no dispositions resulted in at least some convictions. Arrests are taken to indicate a pattern of behavior even if convictions are not indicated. Prior arrests showing dispositions by dismissal or acquittal are given weight against defendants in making tracking decisions, the presumption being that dismissals are not often made "on the merits". The track in which a case is placed affects the plea offers which will be made.

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3 In their post-trial brief, filed April 6, 1978, defendants contend that: "A substantial effort will be made during the coming year by OCA to supply dispositions on all open cases."

The Major Felony Program is a program designed to insure special treatment for crimes regarded as most serious by the New York District Attorney's office. Major Felony Program cases are not plea bargained. The rap sheet plays a part in determining whether a defendant will be tracked into the Major Felony Program and is used in its raw form, as presented by defendant Rogers. Defendants' prior records are evaluated according to a point system. For each prior felony conviction, the defendant accrues eight points against him. For each prior misdemeanor conviction, the defendant accrues three points against him. For each prior arrest for the same or a related charge which appears without a disposition, the defendant accrues five points against him. For each pending case, the defendant accrues five points against him. Pending cases which are also related charges accrue points against the defendant in both categories. A prior open felony arrest on the same or a related charge costs the defendant more points than a prior misdemeanor conviction. A total of fifty points is needed to enter a defendant into the Major Felony Program.

The Career Criminal Program is a program designed to insure vigorous prosecution of defendants with substantial criminal records. The rap sheet is the exclusive determinant of whether or not a defendant should be tracked into this program, a determination made according to a point system. Rap sheets are used for Career Criminal Program evaluation without being verified or checked by the District Attorney's office. Defendants accrue eight points against them for one prior felony conviction and fifteen points for two or more prior felony convictions. Defendants accrue three points against them for one prior misdemeanor conviction and five points for two or more misdemeanor convictions. Defendants accrue five points against them if they have a pending charge, five points for having three or more prior felony arrests and three points for having a former arrest where the top charge was for possession of a weapon. Thirty-five points are needed to enter a defendant in the Career Criminal Pro-

gram. Such cases are not plea bargained except in extraordinary circumstances.

Judges rely upon rap sheets in setting bail. In making bail determinations, judges often give weight to prior arrests, even if they resulted in dismissals or acquittals. Defense attorneys are not generally able to secure disposition data missing from rap sheets for use at arraignments. The court is also unable to do so. The recommendation of the District Attorney is a very significant factor influencing courts in the setting of bail. These recommendations are determined by senior District Attorneys, without input from defense counsel. The District Attorney's office does not check on alleged errors in rap sheets because the time pressures in arraignments do not permit such a check.

In Manhattan, 85 - 88% of cases are disposed of prior to trial and approximately 65% are disposed of at arraignment.

Defendants represented by the Legal Aid Society are frequently unable to make bail, and are, therefore, incarcerated pending disposition of their cases. Defendants whose rap sheets show prior arrests, even with favorable terminations, are held on higher bail, prosecuted more vigorously and sentenced more harshly than defendants whose rap sheets show no prior arrests. Once set at arraignment, bail is rarely reduced because of new rap sheet information.

The probation department includes in its presentence reports information, including a brief statement of facts, concerning each past arrest of the defendant appearing on the rap sheet, irrespective of whether each resulted in dismissal or acquittal. The probation department makes sentencing recommendations to the court, including whether it believes incarceration is justified. The department infers a pattern of behavior of a defendant from arrests followed by dismissals. Rap sheets showing multiple prior arrests which were dismissed may thus nonetheless lead to a recommendation of incarceration.

Rap sheets are used to make licensing determinations by the New York City Police Department, which issues licenses

for pistols, designation as a special patrolman, tow drivers, and tow owners as well as other miscellaneous licenses. Charges listed on rap sheets are considered in licensing determinations on some occasions even if they are shown to have been dismissed the department finds a "pattern of arrests" on a rap sheet, even if all charges were dismissed, it will make further inquiry into the circumstances surrounding the dismissals.

Finally, persons are on occasion denied employment because of entries on rap sheets which are inaccurate, incomplete, or inappropriately included.

CONCLUSIONS OF LAW

1. DCJS is legally responsible for such rap sheet defects as the evidence on the trial established.

A threshold question to resolution of this controversy is whether DCJS is responsible for the accuracy and completeness of the records which it disseminates, a matter which was sharply contested by the parties both at the trial and in their post-trial briefs. Specifically, defendants contend that personnel of the Office of Court Administration (OCA) a division of the New York State judicial department, are responsible for supplying DCJS with complete, accurate and timely disposition information. Therefore, it is defendants' position that OCA should be held responsible for the rap sheet defects of which plaintiffs complain.

Plaintiffs maintain that DCJS is responsible for rap sheet quality on two grounds: first, because DCJS is the recipient of Law Enforcement Assistance Administration (LEAA) funding for the maintenance of criminal histories; and second, because DCJS as the disseminator of rap sheets should be charged with responsibility for the quality of their contents.

A. The impact of LEAA funding and relevant statutes.

Defendants point out that both DCJS and OCA are recipients of LEAA funding. Under 42 U.S.C. §3771(b), certain duties are imposed on recipients of LEAA funds where, as here,

the funds support systems for the maintenance of criminal record histories. The statute provides, in pertinent part, that:

> "All criminal history information collected, stored, or disseminated through support under this chapter shall contain, to the maximum extent feasible, disposition as well as arrest data where arrest data is included therein. The collection, storage and dissemination of such information shall take place under procedures reasonably designed to insure that all such information is kept current therein ....

The penalty for violation of this provision is a $10,000 fine, to be imposed administratively. 42 U.S.C. §§3771(c) and 3757-8. The fine is to be imposed "in addition to any other penalty imposed by law." However, nowhere in §3771 is there any indication that it was meant to create a private right of action for benefit of individuals claiming to be aggrieved by violations of its substantive command. The existence of such a private right of action cannot, as plaintiffs appear to believe, simply be assumed by this court. See, Regents of University of California v. Bakke, _____ U.S. _____ (1978). Cf., 42 U.S.C. §3776(c)(4) (private actions may be brought to enforce the antidiscrimination provisions of LEAA grants only after exhaustion of prescribed administrative remedies.)

Since no private right of action is provided for by 42 U.S.C. §3771, plaintiffs may not rely on it as a basis for the relief sought here.[4] The statute accordingly does not help this court in determining either (1) whether DCJS, or some other state agency, is answerable for the alleged defects in the state's system for maintenance of criminal histories; or (2) what substantive standards to apply in assessing the legality of the system.

The court is not, however, without authority on which

[4] Specifically, plaintiffs insisted that it was unlawful for DCJS to list arrest charges rather than formal charges on its records, and asked the court to enjoin that practice. Since there was no legal authority for this claim other than the federal statute here found inapplicable and appurtenant regulations not in effect at the time of trial, 42 Fed. Reg. 234 (12/6/77), the court must reject it.

to base a conclusion that DCJS is legally responsible for the quality of its rap sheets.

B. The New York Statutory Scheme

Pursuant to §837(6) of the New York Executive Law, DCJS is empowered to:

> "Establish, through electronic data processing and related procedures, a central data facility with a communications network serving qualified agencies anywhere in the state, so that they may, upon such terms and conditions as the commissioner, and the appropriate officials of such qualified agencies shall agree, contribute information and have access to information contained in the central data facility, which shall include but not be limited to such information as criminal record, personal appearance data, fingerprints, photographs, and handwriting samples..."

N.Y. Exec. L. §837(b) (McKinney's 1978 Supp.). DCJS is further empowered, by the New York Executive Law:

> "In cooperation with the state administrator of the unified court system as well as any other public or private agency, (a) through the central data facility [to] collect, analyze, evaluate and disseminate statistical and other information and data...."

N.Y. Exec. L. §837(4) (McKinney's 1978 Supp.).

The Executive law provides further that:

> "1. It is hereby made the duty of the state administrator of the unified court system ... to transmit to the commissioner [of DCJS], such information as may be necessary to enable him to comply with subdivision four of section eight hundred thirty-seven."

N.Y.Exec.L. §837-b (McKinney's 1978 Supp.). Thus it is clear that, as defendants contend, the Office of Court Administration (OCA) has responsibilities with respect to the production and content of rap sheets. But DCJS is not entitled to sit on its hands if OCA is delinquent in those responsibilities, and to claim that it is without power to remedy the resultant defects in the rap sheet system, for it is clear that DCJS has power to enforce the command of Executive Law §837(4):

> "For every neglect to comply with the requirements of this section, the commissioner [of DCJS] may apply to the supreme court for an order directed to such person to secure compliance. Upon such application the court may issue such order as may be just, and a failure to comply with the order of the court shall be a contempt of court and punishable as such."

N.Y. Exec. L. §837b-2 (McKinney's 1978 Supp.). Defendant Rogers conceded at trial that the agency has never exercised its power under Executive Law §837b-2 to secure compliance by other state agencies with the reporting responsibilities imposed on them by §837b-1. He also contended that rap sheet deficiencies were largely attributable to failures by such agencies to fulfill their responsibilities under the latter provision. Such an argument cannot be accepted by the court in the face of the clear evidence that defendant Rogers might have brought significant sanctions to bear on uncooperative state agencies, but chose not to do so.

C. Legal Precedents

Furthermore, this court finds instructive the result reached by a District Court for the District of Columbia in response to allegations very similar to those made in this case against the Federal Bureau of Investigation (FBI). The FBI performs on a national scale functions which are highly analogous to those entrusted in the New York State criminal justice system to DCJS. In Tarlton v. Saxbe[5] the FBI was sued for, inter alia, maintaining and disseminating 'rap sheets' with stale and non-existent data. The FBI in response averred that state and local agencies were, in the first instance, responsible for supplying it with, and for entertaining objections to, the material in its files. The District Court considered this argument and rejected it, noting that:

> "[S]tate and local responsibility does not imply non-responsibility on the part of the FBI."

Tarlton v. Saxbe, 407 F. Supp. 1083, 1086 (D.D.C. 1976) (on remand). Going further, the court observed that:

> "The FBI cannot proceed undisturbed by the serious danger to individuals caused by unreported dispositions and 'stale' files, nor can it totally relegate responsibility for such deficiencies to local

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5 Tarlton v. Saxbe was originally dismissed by the District Court, on motion of the FBI, but reinstated by the D.C. Circuit's reversal and remand, on the ground that a cause of action was stated. Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974).

> agencies and courts .... The court therefore directs the FBI to conduct a feasibility study concerning such systems and procedures as would enable the FBI to keep the disposition entries in its criminal files reasonably current."

Id., at 1089.

As the D.C. Circuit observed in an action related to Tarlton, supra (holding that the FBI could not maintain records of detentions not resulting in arrests or further prosecution):

> "The FBI's function of maintaining and disseminating criminal records and files carries with it the responsibility to discharge this function reliably and responsibly and without unnecessary harm to individuals whose rights have been invaded. The FBI cannot take the position that it is a mere passive recipient of records received from others, when it in fact energizes those records by maintaining a system of criminal files and disseminating the criminal records widely, acting in effect as a step-up transformer that puts into the system a capacity for both good and harm.

Menard v. Saxbe, 498 F.2d 1017, 1026 (D.C. Cir. 1974).

There is thus precedent for holding the collecting and disseminating agency accountable for rap sheet inaccuracies, though they may be partially attributable to failures on the part of other agencies.

Accordingly, this court holds that DCJS may properly be charged under the law with responsibility for such defects as the evidence cited above disclosed.

2. DCJS' dissemination of incomplete, inaccurate and ambiguous rap sheets as established at trial may result in serious violations of the rights of criminal defendants.

Plaintiffs allege that dissemination by DCJS of rap sheets which are inaccurate, incorrect or ambiguous results in violation of their rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

a. Due Process and Right to Counsel in Bail Determination at Arraignments.

The most serious constitutional harm to plaintiffs resulting from rap sheet defects

stems from the reliance by courts and prosecutors on DCJS rap sheets at arraignment sessions. The evidence shows that a great deal of the business of the criminal justice system in New York is disposed of in the arraignment sessions of its courts. Indeed, some 65% of all criminal cases are resolved, by pleas of guilty or otherwise, at such sessions. Further, arraignment is the phase of the criminal justice process when courts must pass upon the question of bail for the accused. Plaintiffs are indigent persons for whom the imposition of bail in any but the most nominal amount means that they will certainly be incarcerated until their cases can come to trial. Such individuals manifestly have a liberty interest at stake in the matter of bail determination. Plaintiffs have shown that bail determinations have been made in criminal proceedings in which they were involved in reliance on DCJS rap sheets.

The evidence reveals that, at the time of trial of this action, 62% of rap sheets contained erroneous, incomplete, or ambiguous information with respect to the disposition of prior arrests of the defendant to which they pertained. It was revealed also that an individual's prior arrest record, as portrayed on DCJS rap sheets, was a key factor relied on by District Attorneys in making recommendations with respect to bail, in turn a key factor relied on by state court judges in making bail determinations. Judges were also shown to utilize rap sheets directly for purposes of setting bail.

The evidence shows that time considerations make it impossible for defense attorneys to correct rap sheet errors or to supply missing information at arraignment sessions. At most, the attorneys are able to interrogate their clients about such errors and omissions, but courts were shown to be unwilling to accept corrective data not independently verified by counsel.

In Townsend v. Burke, 334 U.S. 736 (1948), the Supreme Court invalidated the conviction of a defendant who had been sentenced by the trial court judge on the basis of

an erroneous report of prior arrests. The defendant (petitioner before the Supreme Court) had been unrepresented by counsel during the proceedings before the trial court. The Court said:

> "[W]hile disadvantaged by lack of counsel, this petitioner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand."

334 U.S. 736, 741. Making clear the basis for this result, the Court pronounced:

> "It is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, which renders the proceeding lacking in due process."

334 U.S. 736, 741.

The result reached in the State of New York, when judges base bail decisions on incorrect and/or incomplete rap sheet information at arraignments, is for all practical purposes the same as that found unconstitutional and impermissible by the Supreme Court in Townsend v. Burke. Although the plaintiffs here were represented by Legal Aid attorneys at their respective arraignments, counsel's ability to remedy rap sheet defects in the arraignment context was, as found above, de minimus. In this connection it appears that counsel's presence is merely physical -- it is not effective to protect the accused. The result is the rendering of bail decisions on the basis of erroneous information, without effective assistance of counsel in violation of the Fourteenth Amendment's Due Process Clause, of the Sixth Amendment's guarantee of the right to the effective assistance of counsel, and of the Eighth Amendment's guarantee of the right to be admitted to reasonable bail.

For all of the foregoing reasons, DCJS may not continue to list convictions which have been overturned on appeal in its rap sheets, without making note of appellate reversals. Similarly, in the arraignment context, reliance by courts on

rap sheet entries which were shown to be so ambiguous as to be uninterpretable even by DCJS personnel may lead to the improper imposition of excessive bail . Ambiguous rap sheet entries included those listing pleas of guilty to charges designated as combined; listing convictions of attempt offenses by reference in the disposition column only to N.Y. Penal Law §110.00, with no indication of the underlying substantive offense; and the reporting of dispositions listing convictions of more than one count of a single section of the N.Y. Penal Law, where no verification of the multiple count dispositions had been obtained.

DCJS may not escape responsibility for this result on the ground that it is the court, not itself, which is making the arraignment bail determination on the basis of incorrect or incomplete information.

> "It is established that a conviction obtained through the use of false evidence known to be such by representatives of the State, must fall under the Fourteenth Amendment .... The same result obtains when the State, although not soliciting false evidence allows it to go uncorrected when it appears.

Napue v. Illinois, 360 U.S. 264, 269 (1959).

It is amply clear from all of the foregoing that plaintiffs are demonstrably harmed by reliance by prosecutors and courts on incomplete, ambiguous and erroneous information presented on DCJS rap sheets and used as a basis for bail determinations at arraignment sessions. The only available state remedy, the procedure for correction of records under N.Y. CPL §160.50(3), is clearly too time consuming to be adequate to protect the interests affected.

b. Use of rap sheets for sentencing purposes.

The evidence showed further that rap sheets were utilized by the courts after the arraignment stage, to make sentencing decisions in the plaintiffs' cases.[6] It is

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[6] Any defendant convicted of a fingerprintable offense under CPL §160.10 may not be sentenced until his "rap sheet" has been submitted to the sentencing court. CPL §390.10 (McKinney's 1978 Supp.).

clear that an arrest cannot validly be treated as a conviction for sentencing purposes without offense to the due process clause. U.S. v. Rao, 296 F.Supp. 1145 (S.D.N.Y. 1969). It was adequately demonstrated, however, that after the arraignment stage there is sufficient opportunity for defense attorneys and court personnel (particularly members of the probation department) to verify rap sheet entries. New York's Criminal Procedure Law (CPL) provides ample opportunities for plaintiffs to correct any misinformation supplied to the court in connection with sentencing and, indeed, courts are forbidden to consider any material not disclosed to the defendant. See, People v. Washington, 93 Misc. 2d 164 (Crim. Ct. 1978); CPL §§390.40, 400.10. Thus, no harm results at this stage from such inaccuracies, ambiguities and omissions as may exist.

c. Use of rap sheets for licensing purposes.

Plaintiffs further alleged that DCJS' maintenance of rap sheets which contain errors, omissions and ambiguities is prejudicial to the extent that rap sheets are used in a variety of state licensing proceedings. To the extent that denial of certain licenses may result in harm to the interests of plaintiffs in pursuing certain kinds of employment, a Fourteenth Amendment liberty interest, Greene v. McElroy, 360 U.S. 474 (1960), such denials offend due process when premised on misinformation gleaned from DCJS rap sheets. See, Paul v. Davis, 424 U.S. 693 (1976). However, in the licensing context, plaintiffs are not without means to protect themselves. They may challenge and correct errors in rap sheets by pursuing the statutory remedy provided in CPL §160.50. And, for all criminal cases disposed of after September 1, 1976, a new provision of the CPL requires that a court, on reaching any disposition favorable to the accused[7]

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7 "Termination favorable to the accused" means a dismissal, acquittal, reversal or vacation of a conviction, CPL §160.50(2), or dismissal of a charge upon entry by the defendant of a plea to a lesser charge. People v. Robertson, supra.

in a criminal case, direct the return of all fingerprints, palmprints and photographs related to the case and also the sealing of all related DCJS records. CPL §160.50; People v. Natalie Robertson, NYLJ p. 11, col. 4, (Criminal Court 1/23/79). Thus, the burden of pursuing the corrective remedy of CPL §160.50 falls only on those defendants who may be prejudicial by older incorrect records.

Plaintiffs put in some evidence which tended to show that one of them, Lawrence Stubbe, was discharged from employment with a bank once his employer had been supplied with a copy of a DCJS rap sheet containing erroneous notations of prior criminal activity on his part. On the record it was not clearly established that no other factors were responsible for or contributed to this individual's loss of employment, however. Moreover, the order which is required by virtue of the violation of plaintiffs' Fourteenth and Sixth Amendment rights (See §2(a), supra) will provide some incidental relief to any plaintiffs who are confronted with discharges such as that allegedly suffered by the plaintiff Stubbe.

d. Law enforcement related use of records of arrests not resulting in conviction.

Plaintiffs asked this court to enjoin the use of arrests, even though accurately recorded, not resulting in conviction for purposes of bail, prosecutorial evaluation, sentencing and licensing. This court is of the view that plaintiffs are not entitled to such relief. Several courts have recognized that accurate arrest records may be maintained and used by criminal justice enforcement personnel in the bail, prosecution and sentencing contexts without consitutional infirmity. Williams v. New York, 337 U.S. 241 (1949)(trial court may properly take into account defendants' arrests not resulting in convictions for sentencing purposes); see also, U.S. v. Cifarelli, 401 F.2d 512 (2d Cir. 1968); U.S. v. Dionisio 410 U.S. 1, 15 (1973) (grand jury may consider mere arrests in performance of its functions); Russell v. U.S., 402 F. 2d 185

(D.C. Cir. 1968) (court can consider arrests not resulting in conviction or plea for purposes of setting bail pending appeal). See generally Utz v. Cullinane, 520 F.2d 467 (D.C. Cir. 1975). Expunction of records of arrests not resulting in conviction is not required on constitutional grounds unless the arrests resulted from a narrowly defined group of impermissible circumstances -- such as illegal arrests, mass arrests, and harassment. U.S. v. Schnitzer, 567 F.2d 536 (2d Cir. 1977); Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973); U.S. v. Seasholtz, 376 F.Supp. 1288 (N.D. Ok. 1974); see also, Hammons v. Scott, 423 F. Supp. 625 (N.D. Cal. 1976).

Plaintiffs allege that such uses of arrest records deprive them of the presumption of innocence to which they are entitled under the Fifth Amendment. The federal courts have, however, rejected this contention. The Second Circuit's decision in U.S. v. Doyle is illustrative:

> "The aim of the sentencing court is to acquire a thorough acquaintance with the character and history of the man before it. Its synopsis should include the unfavorable, as well as the favorable, data, and few things could be so relevant as other criminal history of the defendant, particularly activity closely related to the crime at hand. Counsel suggests that although a 'criminal record' may be considered, crimes not passed on by a court are beyond the pale, but we see nothing to warrant this distinction .... To argue that the presumption of innocence is affronted by considering unproved criminal activity is as implausible as taking the double jeopardy clause to bar reference to past convictions.

U.S. v. Doyle, 348 F.2d 715, 721 (2d Cir.), cert. denied, 382 U.S. 843 (1965). See also, Williams v. New York, supra; CPL §390.10 (requiring submission of rap sheets to sentencing courts) and CPL §390.30(1) (presentence reports, where required, must cover "the defendant's history of delinquency or criminality.").

CONCLUSION

Plaintiffs are clearly and systematically being deprived of due process in violation of the Fourteenth Amendment to the U.S. Constitution, and of the right to the effective assistance of counsel as guaranteed by the

Sixth Amendment, whenever rap sheets containing erroneous, ambiguous, or incomplete data with respect to prior arrests and dispositions are submitted to courts at arraignment sessions for use in connection with bail determinations. The Eighth Amendment right to reasonable bail is also thus denied. In the arraignment context, neither plaintiffs nor their counsel is capable, as a practical matter, of correcting errors, resolving ambiguities, or supplying missing information to cure defects contained in rap sheets. It is obvious that the result is frequently the imposition of bails in amounts exceeding those which would be set if complete and accurate information were available to the courts.

Defendant Rogers has shown that there are substantial administrative and fiscal obstacles making it difficult, if not impossible, for his agency, DCJS, to prevent the occurrence of some errors and omissions in rap sheets. He has failed, however, to submit any proof which would move this court to conclude that an error rate of the magnitude of that which has been shown should be countenanced. Mere administrative convenience and fiscal limitations are no excuse where violations of constitutional rights are concerned. Hamilton v. Love, 328 F.Supp. 1182, 1194 (E.D. Ark. 1971).

It is clear to this court, however, that three factors which had not yet begun to operate at the time of trial will work to improve the level of accuracy and completeness in DCJS rap sheets in the future. First, a recently enacted provision of the New York Criminal Procedure Law guarantees that DCJS rap sheets will no longer contain notations of arrests without corresponding dispositions in the case of arrests occurring after September 1,

1976, where the proceedings were terminated favorably to the accused. CPL §160.50 (McKinney's 1978 Supp.). Second, DCJS has recently become subject to new regulations promulgated by the LEAA which will require substantially better performance on the part of DCJS, if the imposition of administrative sanctions, including fines, is to be avoided.[8] The new regulations also include certain reporting requirements which subject DCJS operations to federal administrative scrutiny. Finally, defendant submitted some proof at trial tending to show that DCJS was, at that very time, in the process of implementing new measures to improve the timeliness of disposition reporting to DCJS.

Although federal courts have broad equitable powers to fashion relief where constitutional violations have been shown, it is also clear that these powers are not to be exercised with abandon. Public officials should not be allowed to evade injunctive orders by making protestations of repentance, Carey v. White, 375 F.Supp. 1127 (D. Del. 1974), but neither should courts order injunctive relief where there is no showing of current and future wrongdoing on their part. U.S. v. Oregon Medical Society, 343 U.S. 326 (1952). It appears to this court that future violations by the agency will be greatly minimized, at least in comparison with those which plaintiffs established took place in the past and that the declaratory relief set forth herein is all that appears to be necessary at this time. An injunction will therefore not issue. However, defendant Rogers will be directed to prepare a feasibility study for submission to the court within one year from the date of this order with respect to how errors, omissions and ambiguities

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[8] 28 C.F.R. 20.1 et seq., as amended, 42 Fed. Reg. 234 (12/6/77).

could be corrected in records prepared under the now superseded JC-500 system which are still being disseminated.

Little mention has been made to this point of defendant McGuire, Commissioner of the New York City Police Department and nominally a defendant in this action. At trial it was established that the New York City Police Department no longer originates any rap sheets. Its role is now solely confined to providing rap sheet copies on request, when the malfunctioning of DCJS computers makes it impossible for the latter agency to produce them. Further, as found above, the use made by the Police Department of rap sheets in connection with its licensing functions contains no legally cognizable defect which will not be remedied as an incident of the relief already found appropriate with respect to DCJS.

The court also declines to rule on plaintiffs' contentions under the New York State Constitution. At trial and in their post-trial submissions, plaintiffs failed to detail with specificity how they relied on the cited provisions of the state constitution. See, Koch v. Yunich, supra.

This court will retain jurisdiction over the instant action for a period of one year and 60 days from the date of its order to receive the feasibility plan and to hear and determine any motion with respect to such plan. In short, after the plan is submitted either party must move promptly for its acceptance or rejection.

Submit order on five days' notice.

Dated: New York, New York
February 16, 1979

SO ORDERED

Constance Baker Motley

CONSTANCE BAKER MOTLEY
U. S. D. J.

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June 20, 1983

Hon. Charles McC. Mathias, Jr.
United States Senator
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Mathias:

I appreciate having had the opportunity to be of service to the Subcommittee on Patents, Copyrights and Trademarks in its consideration of some of the problems raised by federal or federally supported computerized criminal history information systems. With respect to the follow-up questions in your letter of May 27, I offer the following.

1. The Tatum litigation primarily addressed the use of criminal records in bail decisions. But, of course, these records are used at other points throughout the criminal justice process. Should arrest records lacking disposition data be available to police investigators? To judges at sentencing? To parole boards? Should this data be available for some criminal justice purposes but not others?

Professor Trubow has testified that "criminal justice agencies should have access to all criminal history record information included in a national computerized system." Do you agree?

At the outset, one phrase in the question requires subdivision. "Arrest records lacking disposition data" might refer to records of cases which are still pending, and thus have no dispositions to report, or it might refer to cases which have been disposed of but for which the system fails to report the disposition. ACLU's position is different with respect to these two types of data.

Cases which have been disposed of but for which no dispositions are reported should not be available at any point in the criminal justice process. One of the things which the Tatum litigation documented quite thoroughly is that judges and other decision-makers routinely infer guilt from the fact of a charge not followed by any disposition. This inference violates due process of law because, in many cases, it causes prejudice to an individual who in fact was not convicted. In all cases it is made blind; that

is to say, it is without rational basis. There simply is no way for the information's user to know whether the individual was or was not guilty. To assume guilt in such a circumstance plainly violates due process of law.

Apart from this consideration, denying the criminal justice community use of such data is one of the most effective ways to motivate it to make greater efforts to insure the completeness of data. One of the reasons arrest data are as complete as they are is that the criminal justice system would not stand for having less complete data. Disposition data stand on a different footing, as I suggested in my testimony. The criminal justice system, at least as represented by prosecutors, judges, probation officers, prison officials and other governmental users of criminal history information (the defense bar segment of the criminal justice system obviously feels quite differently), fundamentally does not care very much whether disposition data are timely reported. If these parts of the criminal justice system were denied the use of arrest data for which no disposition data are reported, disposition data would become enormously more important to them, and pressure would build for operators of computerized criminal history information systems to insure that dispositions were timely and accurately collected and reported. It is clearly necessary for the law to prescribe standards of accuracy of completeness, or at least methods which must be used to achieve those goals, but one cannot ignore the effectiveness of inter-agency pressures in addition to legislation.

With respect to arrest records which lack dispositions because the cases are still pending at the time the arrest record is generated for use, we take the position that such records should be available for some purposes but not for others. For example, the fact that a defendant who stands before the court for a bail hearing is simultaneously facing other charges in a different proceeding is arguably relevant to the bail consideration. A defendant facing multiple charges may be facing the possibility of more prison time if he is convicted because he may receive consecutive sentences or may be sentenced under a multiple offender statute. This in turn may affect his willingness voluntarily to return for trial on the charges—the only proper consideration on a bail application. In this context, therefore, open charges may be relevant. But they are not relevant at the sentencing stage, for example. The fact that a defendant standing before the court for sentencing faces other charges in another forum is no basis for imposing a harsher sentence; defendants should be sentenced based upon their record of convictions, not the record of unproven accusations leveled against them. Thus, very careful distinctions must be made when deciding who should have access to records of pending cases.

In this context, I hasten to point out that to make the distinction between the two types of data I have discussed here, a systematic, periodic inquiry into the status of open cases, such as I suggested at the hearing on May 12, is essential. It is, I sug-

gest, the only way to insure that cases reported as open truly are open, and it is the only way to insure that case dispositions are tracked and reported in a timely fashion.

With respect to Professor Trubow's testimony that "criminal justice agencies should have access to all criminal history record information included in a national computerized system," I am unable fully to agree. At the outset, some of the data presently included in computerized criminal history information systems are irrelevant for any legitimate law enforcement purpose, and their retention and use is constitutionally repugnant. I refer to records of charges which were disposed of by other than conviction. ACLU's position is that any charge which does not result in conviction ought to be expunged from an individual's criminal history record, because no inference adverse to the individual may legitimately be drawn. Thus, charges of which the defendant is acquitted, charges which are dismissed by decision of the court, charges which are dismissed as part of a plea bargain and charges which are withdrawn unilaterally by the prosecutor ought never to appear on an individual's criminal history record thereafter. To permit them to appear invites the criminal justice system to infer guilt of those unproven charges and to act against the individual on that basis. To do this overtly has always been thought to be unacceptable in our constitutional system; to permit those charges to remain on an individual's criminal history invites that constitutional abuse.

Even apart from those data, I disagree the breadth of Professor Trubow's statement. Criminal justice agencies who have legitimate need for data ought to have access to them. As I mentioned above, however, different stages of the criminal justice process have different data needs, and the availability of data ought to be made to depend on a showing of legitimate need.

2. Your testimony did not address the issue of non-criminal justice access to criminal history records. Does the ACLU have a position on this issue? On whether national standards ought to be legislated? If so, on what those standards ought to be?

ACLU's position on non-criminal justice access to criminal history records parallels its position on official access to such records. No individual or agency, public or private, ought to have access to such governmentally collected data unless a demonstrated legitimate need for them exists. In no case should any private entity have access to anything other than conviction data, since no action adverse to the individual in the private sector can ever properly be based on other than conviction data. Beyond this, however, is the question of whether government should act in any respect as a dossier collector for private interests. We believe that while a prospective employer, for example, may properly ask an individual about his conviction record, that does not invest government with either the responsibility or the option of acting as a private investigator for prospective employers. Parti-

cularly in light of the demonstrated paucity of quality of existing criminal history information systems, for government to make such shoddy data available outside of the criminal justice system merely compounds an already disgraceful situation, inflicting punishment on the basis of data which are all-too-frequently inaccurate, incomplete, ambiguous or constitutionally irrelevant. That is not a proper governmental function.

ACLU does feel that national data standards ought to be legislated, in part because the experience of the past fifteen years has demonstrated beyond possibility of argument that if there are no standards, there will be no quality. As I suggested in my testimony, rather than kidding ourselves by being content with meaningless exhortation, as by saying records must be accurate and complete "to the maximum extent feasible,"* and rather than misdirecting our attention to mythical percentage goals, as by saying that records must be 90% or 95% or 99.9% complete, we should legislate specific procedures which must be followed by system operators in order to insure that record systems will perform well. All system operators will quickly assert, as you heard in their testimony, that they wish their systems operated with perfect accuracy. The problem is that wishing will not make it so, and system operators have been unwilling to adopt procedures which would make that lofty and easily spoken goal closer to being a reality. I suppose that what I am saying is that talk is cheap; what is required is prescriptive legislation which details record acquisition, retention, verification and audit procedures which will operate to produce complete and accurate data. One such device would be the periodic check into apparently open cases, as I mentioned at the hearing. Another would be to insist on periodic audits (which C.F.R. now purports to do) but also to insist that these audits be done by comparing the criminal history information in the computerized system with the original court records to verify its accuracy (which C.F.R. fails to require). I would be happy to elaborate on these ideas and to design others if the Subcommittee's deliberations progress to a point which would make that appropriate.

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* This is the wording used in the 1970's attempts at federal regulation of computerized criminal history information systems, as, for example, when the Justice Department, faced with massive state inability or unwillingness to comply with federal guidelines concerning completeness and accuracy, simply abandoned the thought of any significant enforcement effort: "To the maximum extent feasible, it is expected that all States will continuously work toward the goals set out in § 20.21(a) without undue delay." 42 Fed. Reg. 61,595 (1977). See also 28 C.F.R. § 20.21(a) (1980).

3. What problems would you anticipate over the next decade in record quality, access questions, or other areas, if the interstate records exchange system continues to develop without Congressional action?

I expect that the problem of record quality and access over the next decade will be an aggravated, expanded version of what we have already seen. The interstate records exchange system can be no better than the data which it transmits. Without Congressional action, state and federal record systems will not make substantial and successful efforts to improve record quality. Indeed, as the number of systems proliferates, record quality can be expected to decline; the more complicated a mechanism is, the greater the opportunity for it to misfunction. Record quality is already appallingly bad, and there is no reliable indication that it is getting any better. (At this point I hasten to mention that whenever a system operator asserts that his system is operating at a certain percentage of completeness and accuracy, he should always be asked for the basis of the assertion. Has he performed an audit, and if so was it one in which the system's data were compared to the original court records? Unless that is the case, my experience shows that the statements of data quality are meaningless). The problem which Congress now faces in this area is that, because of insufficient action over the past fifteen years, the problems have been allowed to grow without restraint. The result is that the federal government now funds a multitude of information systems which routinely inject enormous amounts of incomplete, erroneous and irrelevant information into decision areas of great sensitivity. Congressional inaction aggravates an already critical problem. No criminal justice system which functions largely on the basis of misinformation can command respect, either from the public or from those individuals upon whom the system acts. What our criminal justice system needs more than anything else at this point is to have its legitimacy restored. Certainly I do not suggest that cleaning up criminal history information systems will itself do the job. It will, however, put us an important step closer.

I look forward to the opportunity to be of further service to the Subcommittee. Thank you again for calling upon me.

Sincerely,

Donald L. Doernberg

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Associate Professor of Law
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Responding for the American
Civil Liberties Union

Senator MATHIAS. Our last witness is Mr. William C. Corley, member of the board of the SEARCH Group, Inc., and director of the Police Information Network of North Carolina. And I understand, Mr. Corley, that you are accompanied by your counsel, Mr. Robert Belair.

STATEMENT OF WILLIAM C. CORLEY, MEMBER OF THE BOARD OF DIRECTORS OF SEARCH GROUP, INC., AND DIRECTOR, POLICE INFORMATION NETWORK OF NORTH CAROLINA, ACCOMPANIED BY ROBERT R. BELAIR, COUNSEL TO SEARCH GROUP

Mr. CORLEY. That is correct.

Mr. Chairman, I am the director of the North Carolina Police Information Network, and I am appearing here today as a member of the board of directors for SEARCH Group, Inc., and I am accompanied by Mr. Belair, counsel to SEARCH Group.

SEARCH has filed written testimony with the subcommittee, and I ask that it be included into the record.

Senator MATHIAS. Your full statement will be included.

Mr. CORLEY. Mr. Chairman, for almost 15 years SEARCH has worked for the implementation of a system for the national exchange of criminal history record information. We have sought a system that is effective, and that is protective of individual privacy.

Today, under the guidance of the FBI, its National Crime Information Center and its Advisory Policy Board, a determined effort is being made to establish such a system. SEARCH is pleased to be here to express support for the FBI's efforts to establish the III and to discuss the privacy and individual rights issue related to III.

SEARCH has long maintained that a national criminal history exchange system must operate in a manner that is consistent with three basic principles. First, the system must give criminal justice agencies the ability to obtain comprehensive and reliable criminal history record information quickly and cost effectively.

Second, the system must honor and incorporate State statutes and regulations dealing with the maintenance and dissemination of criminal history record information. This approach is important.

Third, any national system must be protective of the privacy and due process rights of subject individuals. Indeed, SEARCH believes that the III meets all three of these principles. Accordingly, in May 1982, the SEARCH membership group adopted a resolution which formally endorsed the III. That resolution is, if anything, even more appropriate today. Even the OTA report points out that there is a growing consensus in favor of III.

The principal work still to be done is to resolve several policy issues that bear on personal privacy and individual rights that are raised or affected by III. Over the past 15 years, SEARCH has given careful thought to the effect of a III on the privacy rights of record subjects; we have reached two conclusions.

First, we believe that the III concept is inherently protective of personal privacy.

Second, we have identified six policy issues that relate primarily to personal privacy that we believe should be given study. The first such issue is disposition reporting, and you have heard here today

several thoughts on disposition reporting. SEARCH believes that disposition reporting is the most important issue to be addressed.

In my State, for example, we found, in 1979, that of all the arrests that were automated, only 62 percent had a disposition noted. On May 1 of this year our records indicate that we have 79 percent disposition reporting. We have made some progress. Of course, we are not satisfied with this. Consequently, we are continuing to work to improve this disposition reporting.

The second issue that requires attention is the use of the III system for intelligence and investigative purposes.

The third privacy issue concerns the relationship between the dissemination of index information and the dissemination of substantive history criminal record information.

The fourth privacy issue raised by the III is perhaps the most controversial: That is access by noncriminal justice agencies.

The fifth issue is retention and redissemination.

And sixth issue is control and enforcement; what kind of organization should be established to or charged with overseeing the III? In our State we have an advisory policy board for our system similar to the FBI's Advisory Policy Board at the national level. In North Carolina we would hate to see another body established in addition to our advisory policy board. However, we think that our board could be expanded by adding other members.

In conclusion, SEARCH believes now, as it has believed for the last 15 years, that our Nation needs a more effective system for the national exchange of criminal history record information.

SEARCH believes that the III is that system. SEARCH further believes that the III concept is inherently protective of personal privacy and individual rights. Privacy should not be considered an obstacle to the implementation of the III because, in fact, the III provides an opportunity to examine and promote privacy safeguards.

Therefore, SEARCH urges the Congress to provide the FBI with the necessary support for the implementation of the III and further urges the Congress to encourage the FBI and the APB in their efforts to construct this system with the maximum regard for personal privacy and individual rights.

SEARCH, over the past 15 years, has performed much research in this area. We have published many reports in the area, and this has been done, has been made possible because of the leadership and guidance of the Bureau of Justice Statistics. These reports are available and will be made available to the subcommittee.

Mr. Chairman, that concludes my oral comments. I will be available for questions.

Senator MATHIAS. Thank you very much, Mr. Corley. I suppose that success always has a penalty connected with it, and your penalty for success is that we dragged you up here to tell us your story.

OTA noted that 6 or 7 years ago North Carolina had very inadequate records, and was only able to cover about 26 percent of disposition reports. But, in 1975 and 1976 you went to work and raised that from 26 to 75 percent, which is a phenomenal improvement in quality.

Now, you have just said that your records would be available for other jurisdictions. Your methodology is available for other jurisdictions.

Do you think that the factors that enabled North Carolina to improve so dramatically can be duplicated in other States?

Mr. CORLEY. Yes, sir. Some of the methods that we used—and we are going to do it again this summer—we hire interns during the summer to do a review of our files. They take outstanding arrests that have been outstanding for a certain length of time and that have no disposition, they go to the clerk of court office, look up the record, extract the disposition. They bring the disposition back, and we enter the date into the system.

That is one method that we have used for the last 3 years, in other words this will be the fourth summer that we have been able to do that.

Another important development is legislative. In January of last year legislation was passed that requires mandatory fingerprint submission and disposition reporting of all felonies and serious misdemeanors. But the legislators that passed that statute were smart in that they charged each superior court judge, to develop a plan to decide who would be responsible for doing their fingerprinting and who would be responsible for submitting their disposition data.

Frankly, at first we thought that this was going to be an unworkable approach. We have 26 districts in our State, and we have 26 plans. However, it turned out that all our plans are pretty similar, and we think it is successful.

Senator MATHIAS. So you really have that Safeway store checkout counter working.

Mr. CORLEY. Yes, sir.

Senator MATHIAS. Your group, SEARCH Group Inc., is composed of representatives from each State as I understand it.

Mr. CORLEY. Yes, sir.

Senator MATHIAS. That being the case, what is your perspective on State reaction to the III system? Are they happy about it, or do they have fears about it?

Mr. CORLEY. If you address the majority of the SEARCH members, I think you would get an overwhelming vote of support of the III.

I think that was evidenced when SEARCH passed a resolution last year endorsing the III.

Senator MATHIAS. Do you think there will be ultimately a unanimous desire to join?

Mr. CORLEY. Yes, sir, I do.

Mr. BELAIR. Mr. Chairman, if I could just add, I think one of the keys to why SEARCH likes the III is that it is a decentralized system. The records stay with the States. The III concept is that the State which originates the record gets to make the decision about who gets to see it and how that record is used. That has an enormous appeal among the States.

The States and other witnesses have alluded to this, have worked very hard over the last 10 years to come up with an approach to protecting privacy and security. While they do not, by any means, have all the answers, they have a lot of the answers. Today for example, every State has legislation on the subject.

We think that any national system has got to be reflective and respectful of all that work, and I think that is the big appeal of III.

Senator MATHIAS. Of course, all the States may want to go—it is like the old song, everybody talking about heaven ain't going there.

Are all the States technically capable of being incorporated in the system, or do some of them have some work to do?

Mr. CORLEY. I believe some of them have some work to do. During the next phase of the III only 15 of the States, I believe, are participating. However, the fact that some States are not ready should not hold up the III. I think the III should go and take those States on as they become technically capable of participating.

Senator MATHIAS. North Carolina is a State that feels pretty strongly about States rights. I know, because I sat at this table with Sam Ervin for a number of years. How would North Carolina feel about a random audit by the FBI or by some other Federal agency?

Mr. CORLEY. And to enhance that a little bit, my immediate boss, you probably know too, is Rufus Edmonston who is our attorney general, and he was also on Senator Sam's committee here, so you know his feelings.

Senator MATHIAS. I would appreciate it if you would give him my respectful regards, in just those terms.

Mr. CORLEY. However, despite our States rights bias I do not believe that we would have any difficulty if the FBI or some other III-related organization came down and looked at our records. We support programs aimed at improving and enhancing our system.

Senator MATHIAS. Do you think—I know you cannot speak for every judge in North Carolina, but do you think generally the courts and the law enforcement agencies feel the same way?

Mr. CORLEY. Yes, sir.

Senator MATHIAS. As a general matter?

Mr. CORLEY. We are working with the court system in North Carolina now, and on June 1 we will start a pilot test where data from the court system, will be entered automatically into our system. We think that this will cut down on errors and it evidences a real spirit of cooperation.

Senator MATHIAS. Now, as Mr. Belair has just said, one of the attractive features of the III system is that the States hold the records, and they also hold the key as to who is going to have access. That, of course, has a contradiction in it—it could deny completeness—which is one of the justifications for the whole system.

If the requester were given access to the system for employment inquiries or licensing inquiries, a record might be disclosed by one State, but an identical record in another State might not be available, as I gave a previous example to Mr. Trubow.

And the result would be that there would be an incomplete or misleading reading or printout. If noncriminal justice requesters are given access to III, won't we find that we have to establish some kind of uniform rule about the kinds of dissemination permitted for particular kinds of inquiry?

Mr. BELAIR. That is a tough question, obviously, and there are no easy answers.

Senator MATHIAS. It really means a subordination of State law, and not only in that detail.

Mr. BELAIR. I certainly think it is right to say that III is likely to be a vehicle for more uniformity. It is going to be a forum for the States to sit down and hopefully talk about these issues. SEARCH is a big believer in uniformity and in model laws. We have published a number of model laws ourselves. We think that the Uniform Commission on State Laws' efforts to draft a model criminal history record act is a good one.

But I guess when push comes to shove, it is SEARCH's position that if a State, in its wisdom, decides that unlike all of its neighbors it really is simply not going to allow access to its criminal history records by, let us say, a private employer, that that decision ought to be respected, and, of course, ultimately we are no worse off than we are right now.

Right now, for example, if Massachusetts, let us say, has a policy of not permitting private employer access and Florida does, the private employer is simply out of luck as to Massachusetts' records. The III would not change that. And I am not sure that in the long run this is really much of a deficiency.

Senator MATHIAS. There is one speculation you get to, which is that you are going to have a lot of controversy over noncriminal justice access, and it would take a lot of debate and a lot of arguments and people will lose their tempers and fall out.

Mr. BELAIR. They already have.

Senator MATHIAS. Is it worth the trouble? Would it be just better to limit it to justice users?

Mr. CORLEY. I think that some degree of noncriminal justice access may be necessary and therefore I think that it is worth the headaches to look at the issue.

Senator MATHIAS. You think it is worth a little trouble to search out——

Mr. CORLEY. Yes, sir.

Mr. BELAIR. Mr. Chairman, in a sense, there are two issues. One is who gets to ask for information from III? It seems to us that there ought to be a uniform rule as to that.

The seond issue is whether there needs to be a uniform rule as to what kind of information States disseminate to each type of requester. For example, should Massachusetts be allowed to continue to say, "We are simply not going to respond to that type of inquiry." One of the key issues that this brings up—and we focus on it in our written testimony—is: Should a requester be able to know that an offender has a Massachusetts record but the requester is not allowed to obtain that record?

We think that that involves some difficult and important privacy issues.

Senator MATHIAS. It is like the question of whether the jury knows that the defendant declined to answer and all that that concerns.

Mr. CORLEY. That is right.

Mr. BELAIR. We think there is some work to be done in the area of noncriminal justice access, and these are some of the questions that are going to have to be grappled with.

Senator MATHIAS. One of the things you have in your statement is the suggestion that the inquiry not be allowed to remain permanently in the files of the questionnaire, and I am sympathetic to that suggestion.

But I want to know how you are going to enforce it.

Mr. CORLEY. It is difficult, and for example, in my State now, we do not at present say that requestors cannot keep records in their files. However, when we receive an inquiry to our system, we put a statement on the record as to the length of time that the record can be used. We forbid records being used after 90 days. We do not audit requestor files to see that they removed the record, but we at least alert the agency that there are constant changes in an automated system, and that they should reinquire, reuse, so that they will know that they have gotten the latest edition of a record.

Senator MATHIAS. Well, I personally respond very favorably to that. I am not just so sure how it will work.

Mr. CORLEY. It is difficult. We do audit our users as to what they log and how they use records, but we do not check all the files all the way down the line to make sure that records are being removed after 90 days.

Senator MATHIAS. You recommend sanctions. You say if the FBI standards are not maintained, do not let a State come into the III. Do you really mean that?

Mr. CORLEY. Yes, I think that there ought to be sanctions.

Senator MATHIAS. So you think we ought to just get tough?

Mr. CORLEY. Yes, sir. Earlier you asked the question, what is a good percentage of disposition reporting? I think that this is a question that has to be resolved. And I think that we need to be tough on this.

Senator MATHIAS. The FBI looks for the best results possible. I think the official language is "to the maximum extent feasible."

Mr. CORLEY. Is that 90 percent or 99 or 99.9?

Senator MATHIAS. The gentleman right behind you might want to fill in that gap. I think that this is a serious philosophical question, whether or not it really means sanctions ought to be applied. Because if we mean it, then we ought to stick to it and see if that quality cannot be improved. Everybody would benefit in the long run.

Mr. CORLEY. Yes, sir.

Senator MATHIAS. Although somebody might suffer a little bit for awhile.

Mr. CORLEY. We would hope it is the criminal.

Senator MATHIAS. Well, we are grateful to you for being here. And I will make the same request of you that if we send you some further questions in writing, that they may be responded to and made a part of the record.

Mr. CORLEY. Yes, sir. Gladly.

[The prepared statement of SEARCH Group, Inc., follows:]

PREPARED STATEMENT OF DR. ROBERT J. BRADLEY, CHAIRMAN, SEARCH GROUP, INC.

INTRODUCTION

Mr. Chairman and Members of the Subcommittee, my name is Dr. Robert J. Bradley, and I am the Director of Information Systems for the Missouri Highway Patrol.

I am appearing here today in my capacity as Chairman of SEARCH Group, Inc. (SEARCH).

For almost 15 years SEARCH has worked for the creation of a system for the national exchange of criminal history record information. We have sought a system that is effective; that is reflective of the principles of federalism; and that is protective of individual privacy.

Today, under the auspices of the Federal Bureau of Investigation (FBI), its National Crime Information Center (NCIC), and its Advisory Policy Board (APB), a determined effort is being made to establish such a system. This system, commonly called the Interstate Identification Index, or the III, would create a national index to state-held criminal history record information. When operational, it will be possible for criminal justice agencies to obtain a complete record of an individuals criminal history in a cost-effective and timely way. Current systems and procedures relied upon by the criminal justice community to exchange criminal history record data are by no means as comprehensive, cost effective or efficient.

SEARCH is pleased to be here to express its support for the FBI's efforts to establish the III. SEARCH is comprised of criminal justice practitioners and our members will be the principal contributors to and users of the III. Therefore, this testimony is offered from a practioner's viewpoint.

SEARCH has a point of view concerning most of the conceptual and operational aspects of the III. However, in light of this Subcommittee's mandate and interest, we will confine our remarks today to an identification and discussion of what we think are the key privacy and individual rights issues related to the III.

SEARCH GROUP, INC.

We have attached a description of SEARCH and its activities as an appendix to this testimony. Therefore, just a brief summary is appropriate here. SEARCH is a unique national organization operated by the states to represent their interests in matters affecting the development of criminal justice information policy, information systems and statistical programs. SEARCH is governed by a Membership Group consisting of governor-appointed senior officials from all 50 states and United States territories.

SEARCH was founded in 1969 for the express purpose of designing and testing an automated model for the interstate exchange of criminal history information. The system which SEARCH designed and tested almost 15 years ago is conceptually consistent with the III system. In the ensuing years SEARCH has continued to work for the implementation of this kind of system. Most recently, SEARCH's former Executive Director chaired the FBI's III Evaluation Committee which was charged with reviewing the progress of the III prototype test.

NEED FOR A NATIONAL SYSTEM, AND CHARACTERISTICS OF SUCH A SYSTEM

In discussing this issue, SEARCH starts with a fundamental assumption. Our nation has a pressing need for the establishment of a more effective system for the national exchange of criminal history information. This view is shared by virtually all members of the criminal justice community.

Basis for a national system

This broad consensus rests on two considerations. First, offender mobility makes it inadvisable for a state to rely exclusively on in-state criminal history record information. Although the statistics vary, everyone agrees that the percentage of multistate offenders is significant and that is certainly exceeds 10 percent of the offender population.

Second, the use of criminal history record information is vital and growing. Criminal history record information is used for detection and apprehension of offenders. Criminal history record information is also used, and indeed being required, by the courts for pre and post trial determinations such as arraignment and sentencing decisions. What's more, criminal history records are used today by all types of noncriminal justice government agencies and, increasingly, by the private noncriminal justice community.

SEARCH belives that the question is not whether there should be an effective system for the national exchange of criminal history record information, but rather how such a system should operate. This is a question to which SEARCH has devoted much thought and effort over its 15-year history.

Elements of a national system

SEARCH has long maintained that a national criminal history exchange system must operate in a manner that is consistent with three basic principles. First, the system must give criminal justice agencies the ability to obtain comprehensive and reliable criminal history record information quickly and cost effectively.

Second, the system must honor and incorporate state statutes and regulations dealing with the maintenance and dissemination of criminal history record information. This approach is important because the states have primary responsibility for law enforcement, and because, as a practical matter, virtually every state has already worked out its own apporach to the maintenance and dissemination of criminal history data.

For example, SEARCH's research indicates that by 1981, 51 states and territories had adopted statutes or regulations dealing with criminal history record dissemination: 49 jurisdictions had dealt with accuracy and completeness; 43 jurisdictions had dealt with subject access; 39 jurisdictions had established criminal penalties for mishandling of criminal history data; and 32 jurisdictions had dealt with record security issues. What these statutes demonstrate is that the states have given careful attention to this issue, and that there is already a multiplicity and diversity of relevant law. Any national system must build upon, rather than ignore or overturn this body of law. The III does this by establishing a decentralized system which permits each state to continue to make all decisions concerning the maintenance and dissemination of its criminal history record information.

Third, any national system must be protective of the privacy and due process rights of subject individuals. For the reasons set out later in this testimony, the III meets this condition.

The specific characteristics of a national criminal history exchange system have often been described by SEARCH. In April, 1978, for example, SEARCH published a document entitled "A Framework for Constructing an Improved National Criminal History System." In February, 1979 SEARCH published another document entitled "Essential Elements and Actions for Implementing a Nationwide Criminal History Program." Both documents, and numerous prior publications and statements by SEARCH, called for the creation of a national system for the exchange of criminal histories, and described the characteristics of such a system.

1. That substantive criminal history records be created, modified, kept current, maintained and disseminated only at the state level, not the national level (except for criminal history data concerning federal offenses).

2. That at the national level a criminal identification index be created that would contain only identifying information about individuals with criminal history record information and which would indicate the jurisdiction(s) which maintained records about that individual.

3. That this criminal identification index be associated with, and created and maintained as a by-product of a national criminal identification fingerprint file.

4. That authorized requestors be able to query the national index and receive: (a) a positive identification of the subject of the request; and (b) an identification of those jurisdictions maintaining criminal history record information about the subject.

5. That state participation in the system be voluntary; be orchestrated through the state identification bureau or criminal record repository; and that the actual release of criminal history record information always be at the discretion of the state maintaining the criminal history record information.

6. That states have the primary voice in policy and operational decisions concerning the system.

7. That the system operate in accordance with stringent privacy and security standards.

SEARCH believes that the III meets, or can meet, every one of these principles. In 1979, SEARCH's Essential Elements document concluded that "a consensus is emerging" in favor of the III concept. Today, as the OTA Report correctly notes, this consensus has emerged. There is near unanimity within the criminal justice community in favor of the III concept.

In May, 1982 the SEARCH Membership Group adopted a resolution which formally endorsed the III.

"Whereas, there is a clear consensus within the criminal justice community that a national criminal history program should be decentralized and structured around the concept of the interstate identification index (III); and

"Whereas, a multi-state test of the practicability of the III concept is nearing successful conclusion;

"Therefore, be it resolved, that the Membership of SEARCH urges Congress to endorse the creation and operation of a national criminal history program based upon the III concept."

That Resolution is, if anything, even more appropriate today. The APB has successfully tested the III in a test involving six states. Further testing is underway. It appears that the III will be all that many of us have long thought it would be. The principal work still to be done is to resolve those policy issues that bear on personal privacy and individual rights, and it is to those issues that we now turn.

PERSONAL PRIVACY AND INDIVIDUAL RIGHTS

SEARCH is especially proud of its reputation as the voice of the state criminal justice community on issues concerning information privacy and security. Accordingly, SEARCH has carefully examined the effect of the III upon personal privacy and individual rights. We have reached two conclusions. First, we believe that the III concept is inherently conducive to the protection of privacy and individual rights. Second, we have identified six policy issues that relate primarily to personal privacy that we believe should be given study in connection with implementation of the III. Before discussing these six privacy issues, a word about the III's inherent privacy protection characteristics is appropriate.

Inherent privacy protection characteristics of III

First, it must be emphasized that III is a decentralized system. Unlike some other models for the national exchange of criminal history data, the III does not depend upon the creation of a centralized data base of criminal history record information. Decentralization inherently provides a measure of privacy protection.

Second, it must be remembered that the III concept leaves it to each state to make dissemination decisions for those criminal history records which it originated. In this way, the III concept is reflective of state privacy policies. As noted earlier, over the last 15 years the states have devoted enormous attention to the issue of privacy and criminal history record information and, for the most part, have adopted statutes and regulations that protect the privacy of criminal record subjects. Today, every state has at least some statute law that deals with the handling of criminal history record information. Therefore, we think it important that the national system respect the policy decisions made in the state legislatures and state courts on this issue.

Privacy issues related to the III

The FBI, the APB, and the state justice information community, have approached the III privacy issues discussed below in a positive and responsible way. SEARCH believes that these privacy issues should and will be resolved contemporaneously with the continuing technical testing of the III. Thus, we do not view these issues as obstacles to the timely implementation of the III, but rather as opportunities to ensure the protection of personal privacy within the III.

Disposition reporting.—The first, and perhaps most critical privacy issue affecting the III is disposition reporting. It is widely recognized that criminal history record information systems at all levels fail to obtain and record dispositions in a significant percentage of cases. We want to emphasize as strongly as we can that the disposition reporting levels in our systems are improving. In any event, disposition reporting is not a problem caused by, or unique to, the III. Indeed, the goal of the III is to provide the highest quality criminal history data in a timely and reliable manner. However, there is no dispute that disposition reporting remains a real problem.

Accordingly, thought should be given to the initiation of a national priority program to improve disposition reporting levels. We think that the elements of this program require study. However, these elements might well include a requirement that in order to participate in the III, each state must meet a mandatory, minimum disposition reporting level within 5 years of the start of the III. Furthermore, it may well be that the minimum permissible level of disposition reporting should be increased gradually over the remainder of this century, so that by the year 2000 each state participating in the III would have to have a disposition reporting level of, for example, 90 percent. In addition, each state should submit to frequent, periodic audits to monitor disposition reporting level progress.

Investigative and intelligence uses.—A second privacy issue that requires attention and study in connection with the III is the use of the system for intelligence or investigative purposes. The III system can be used to flag particular individuals so that each time a state makes an inquiry as to whether that individual has a record, that inquiry is recorded for surveillance purposes. Whether and how this kind of use

should be permitted requires study and ultimately requires the development of specific policies or regulations.

Dissemination of index data vs. record data.—A third privacy issue concerns the relationship between dissemination of index information and dissemination of substantive criminal history record information. We are concerned that, if possible, the III should not operate in a manner that permits requestors to receive responses from the III without automatically and mandatorily receiving substantive record responses from the jurisdiction maintaining the record. In such a circumstance, requestors would know that a subject has a criminal history record in a particular jurisdiction, but would know no more than that. Thus, requestors would have only the most incomplete and pejorative type of information.

However, when requestors seek information on the basis of a subject's name and not on the basis of a subject's fingerprints, it may well be necessary for the III to respond by verifying the subject's identity, rather than respond by directing the disclosure of criminal history data.

This is a difficult issue and careful study should be given to whether it is possible to operate the III so that when a "hit" is obtained on the III, the response is automatically in the form of a summary or complete criminal history record by the jurisdiction(s) holding the records.

Access by noncriminal justice entities.—A fourth privacy issue raised by the III is perhaps the most controversial—access to the system by noncriminal justice entities. Today criminal history records are used extensively outside of the criminal justice community. For example, both federal and state criminal history record repositories report that a substantial, and in a few cases a majority, of requests for access to records come from noncriminal justice entities.

Most members of the criminal justice community believe that some types of noncriminal justice entities, in some circumstances, need to be able to obtain criminal history record information. However, beyond that, there is little consensus. In that connection, we think that careful consideration should be given to whether noncriminal justice entities should have access to the III, and, if so, what types of entities (only governmental noncriminal justice agencies, or certain types of private sector noncriminal justice entities), and by what method should they obtain access (direct access to the III or access through participating state agencies).

Retention and redissemination.—A fifth privacy issue concerns retention and redissemination. Consideration needs to be given to whether a requestor can retain criminal history record information obtained through the III. In other words, should requestors always be required to make a new request to the III and never be permitted to rely upon information previously obtained from the III. The APB is already on record as opposing retention and we think that this is a positive development.

Similarly, attention needs to be given to whether requestors (other than the state repository) should be prohibited from redissemination of III information to parties outside of their agency. It is difficult to envision a situation where a requestor obtaining information through the III should be permitted to share that information with third parties. If the third party is an authorized requestor, they probably should be required to query the III directly, and if they are not an authorized requestor, they should not be the beneficiaries of redisseminated III data.

Control and enforcement.—The sixth and a final issue, and one that relates only indirectly to privacy but is nonetheless critical, concerns control and enforcement. As to control, SEARCH has steadfastly maintained that the states must have the primary voice in setting policy and operational procedures for the system. The states have the principal responsibility for law enforcement and it is the states that will be the primary contributors to and users of the system.

In order to institutionalize state control, some type of permanent policymaking and oversight entity should be established. This entity should be comprised not only of representatives of the state criminal justice community, but should include representatives of federal criminal justice agencies, local criminal justice agencies, other authorized requestors and representatives of the general public. There are, of course, many different models for such a permanent policymaking and oversight entity, and the exact format of the entity does not matter nearly so much as does the principle that the states must have the primary voice within that entity.

As to enforcement, the III must be established in such a manner that there are effective enforcement mechanisms to ensure that the FBI, the states, and authorized requestors discharge their obligations under the system; and that record subjects whose privacy or other rights are violated have practicable remedies. Here too, more study needs to be done before definitive recommendations are made, but several enforcement mechanisms come to mind. These mechanisms include user agreements between states and authorized requestors and the III setting out the condi-

tions under which states and other authorized requestors can participate in the III; federal legislation establishing rights and obligations and creating a private right of action for record subjects; model state laws accomplishing the same purpose; and agreement among participating states; and federal regulations. In all probability some mix of the mechanisms identified above will be most satisfactory.

CONCLUSION

SEARCH believes now, as it has believed for the last 15 years, that our nation needs a more effective system for the national exchange of criminal history record information. SEARCH believes that the III is that system.

SEARCH further believes that the III concept is inherently protective of personal privacy and individual rights. Privacy should not be considered an obstacle to the implementation of the III because, in fact, the III provides an opportuntiy to examine and promote privacy safeguards.

Therefore, SEARCH urges the Congress to provide the FBI with the necessary support for the implementation of the III with all due dispatch, and further urges the Congress to encourage the FBI and the APB in their efforts to construct this system with the maximum regard for personal privacy and individual rights.

Senator MATHIAS. And once again, I want to apologize to all the witnesses for the delay, which we did not anticipate, but which is always a hazard, as Mr. Trubow knows, when you have a hearing in the afternoon.

I appreciate very much the fact that you have stayed with us until the end.

The committee will stand in recess subject to the call of the Chair.

[Whereupon, at 5:47 p.m., the subcommittee was adjourned, subject to the call of the Chair.]

APPENDIX

ADDITIONAL CORRESPONDENCE

UNIVERSITY OF BALTIMORE,
THE YALE GORDON COLLEGE OF LIBERAL ARTS,
Baltimore, Md., May 10, 1983.

Hon. CHARLES MCC. MATHIAS,
Chair, Subcommittee on Patents, Copyrights and Trademarks, U.S. Senate, Washington, D.C.

DEAR SENATOR MATHIAS: Mr. Charles Graham has asked me to convey my reactions to expungement provisions in the federal law to your committee. I have been concerned with the topic for some years, and I believe that expungement, particularly of arrest without conviction records, is demanded by both the legal and moral standards of our system.

In our system of justice, where one is innocent until proven quilty, it is the responsibility of the United States government to confront its own ability to make mistakes. Even in those cases where the government believes a party is guilty, arrest by itself is never adequate proof of that belief. If the United States, with the vest reservoirs of power it can call upon, can not prove an individual to be guilty and drops charges it has brought, then it should not be allowed to use the device of arrest as evidence of guilt. If an individual is guilty, then he or she should be tried; if not, he or she should not be further persecuted. Justice should never merely be an expedient.

Moreover, if a defendant is found not guilty then it represents the worst form of government abuse to continue to consider an arrest record as any indication of guilt. The government is not an agency independent of its own courts, and when those courts have made a judgment of innocence they have acted on the part of the United States. To maintain arrest records for the use of the government when that very government has found those arrest records to be in error is nonsense.

Morally, more than one scholar has pointed out that when the mass of the power rests with the resources of the state, the individual needs all of the aid we can offer. When all is said and done, it is this simple point upon which our argument rests. If the United States, with all of the resources at its disposal, can not find an individual guilty, then how can we argue that it is in any sense fair or just to maintain the records of our mistake and to use those records to continue surveillance or evaluation of the character of that individual? All of this is true for the records held by the federal government, but is particularly critical when those records are also available to local and state jurisdictions.

There is no question but that crime control and security are of the utmost importance to our society. However, we have been fortunate that as these demands are balanced against the rights of the individual our government has always held that the innocence of an individual prior to conviction in a court of law is a higher priority. The ability to expunge a record of arrest without conviction is necessary for such a balance to be maintained.

I would ask that this letter be included in a record of the hearings of your subcommittee on criminal records and a copy be provided to members of the committee.

Sincerely,

DERRAL CHEATWOOD, Ph.D.,
Department of Criminal Justice.

NATIONAL COUNCIL OF INVESTIGATION AND SECURITY SERVICES,
Washington, D.C., May 11, 1983.

Hon. CHARLES MATHIAS, Jr.,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MATHIAS: Please find my statement as to why we believe that Criminal History should be accessible, not only to all law enforcement, but also to qualified members of the public, on a need to know basis.

For the record, I am Vice President of Legislation for the National Council of Investigation and Security Services (NCISS), representing over 5,000 employers, Vice President of the Council of International Investigators (CII), representing 1,000 companies throughout the world, and Past President of the California Association of Licensed Investigators (CALI).

If I can be of service, please let me know.

Yours very truly,

JACK H. REED,
Legislative Vice President.

STATE CASE LAW

Litigation regarding criminal justice information can be expected at the state level, arising out of common law or state constitutional privacy rights. Common law remedies for defamation protect against the use of inaccurate information, and some courts have allowed sealing of purging of criminal justice information when individual interests were judged to outweigh those of society. There is not much state case law dealing with the subject.

REGULATION OF DISSEMINATION

What presumption will apply to any question of access to criminal justice information? Will criminal justice information be considered open to the public, or not? This question addresses the balance of interest between the individual and society, and should be determined before any of the subsequent questions are considered. Two important consequences flow from settling the question. First, policy analysts have a starting point for addressing specific questions; particular criminal justice information will be assessed against an offender; a burden in addition to whatever other sentence is imposed.

A tenet of our society is that one is considered innocent until he has, by due process of law, been proven guilty; it would be inconsistent to restrict access to arrest and non-conviction records. Since the stigma of a criminal record may prevent employment, which is necessary for rehabilitation, a persuasive argument can be made for a presumption of confidentiality even for conviction data.

On the other hand, society has an interest in protecting itself from criminals, and this militates in behalf of open criminal records. In such case each member of society makes his own judgment about the weight of a criminal record in decisions whether to employ or otherwise associate with another.

Rather than to apply the same presumption to all criminal justice information, an alternative is to apply a presumption of confidentiality to arrest records, non-conviction and intelligence and investigative information, but the contrary presumption to conviction data. That seems to be an implication of the LEAA regulations, and is worth considering.

ARREST INFORMATION

Title 28 restricts public access to arrest records when there has been no disposition for more than one year, unless the data subject is in active process in the criminal justice system or there is authority for the dissemination in a statute, regulation, executive or court order. This restriction is consistent with the presumption of innocence, and denies any probative value to arrest information outside the criminal justice system.

It is frequently urged that simple arrest records ought to be available for pre-employment screening in sensitive positions or for elective office. It may be difficult to decide what jobs are "sensitive", and what information itself. An arrest record merely indicates that charges have been asserted by a particular arresting officer, and can include allegations or unverified information, as well as information of most personal nature which may not be relevant to specific criminal conduct. The individual wants this kind of information kept confidential, if it is kept at all. The

criminal justice system refuses public access to [&] information because disclosure may destroy any value it may have.

CONVICTION INFORMATION

The question is whether the fact of conviction will be available to the public indefinitely. Society wants access to conviction data for a variety of justifiable reasons. The offender wants to regain status in society, and easily accessible conviction information will be an impairment to him. One option for the state is to restrict access to coviction data if an individual has no further involvement with the criminal justice system for some specified period of time. If such an option is desired, the subsidiary questions are: (1) what constitutes involvement, (2) what period of non-involvement is reasonable, and (3) to what sorts of convictions should dissemination restrictions apply?

Involvement could mean an arrest whether or not it results in conviction, or it could be defined as conviction for a subsequent offense.

An arrest without subsequent conviction ought not to be considered "involvement" since a mistaken or unfounded arrest would serve to keep a criminal record open, and the legal immunities from civil liability do not help to deter careless arrests. It seems reasonable that involvement with the criminal justice system be defined as conviction resulting from a prosecution begun or completed within a specified limitation period.

With respect to the time period for an access restriction to become operative, it is often suggested that for misdemeanors or felonies not involving violence, periods of from three to five years are reasonable; for serious felonies, six to ten years may be reasonable. Some research into recidivism indicates that repeat offenses after such periods of non-involvement are unusual.

Misdemeanors and non-violent felonies are generally regarded as the most amenable to restricted access after periods of non-involvement. This has been prevalent recently with respect to convictions for marijuana use, or for "political crimes" connected with civil disobedience.

Arguments are made for closing conviction records even for crimes of violence with respect to effectuating rehabilitation programs. A different question arises if restrictions apply also to especially sensitive employment responsibilities, or where they may be exposure to the same risks involved in the previous conviction; access to conviction data in such circumstances might not be available for inquiries concerning other employment. The question is one of relevance; to what kinds of subsequent employment is a particular conviction relevant with respect to screening?

A commonly used example is conviction for molesting children; it can be urged that such convictions are relevant to any employment entailing close or supervisory relationships with children. On the other hand, such a conviction may be irrelevant to employment as a construction worker or a bank teller. The question of relevance is complicated by a lack of precise knowledge as to why people commit crimes in the first place, which of course makes it difficult to understand the situations in which there may be continued risk of harm.

These difficulties should not prevent a state from choosing to have access restrictions after some period of non-involvement; they relate to what exceptions there may be to such access restrictions. The approach of exception-by-responsibility may provide a reasonable balance between the interests of prospective employers and those of the data subject. The result in such case is not to keep a person's records of certain convictions open to all indefinitely, but rather to make it clear that those convictions will be accessible if the data subject chooses to pursue particular avenues of employment.

It is extremely difficult to handle relevance by statutory language or by regulation, since in the final analysis a subjective judgment must be exercised by the Secretary of the Department of Public Safety.

GOVERNMENT VERSUS PRIVATE SECTOR ACCESS

It is often assumed without discussion that government should have access for non-criminal justice purposes to criminal justice information from which the private sector is excluded. The most prevalent non-criminal justice inquiry is for employment screening; government jobs are presumed to involve a public trust and important responsibilities, which probably accounts for the special access privilege. Those assumptions are worth examining.

Considerations of "public trust" may differ as between elective office and public jobs acquired through appointment or competition. With respect to the latter, the "public trust" may not be performed. Is the job one that entails such risks as to

justify an inquiry into criminal history? Would an inquiry for a similar private sector job be permitted? Of course many governmental jobs involve access to information that may endanger state security or entail responsibilities that pose a special risk to person or property. There are parallel responsibilities also in the private sector; in both sectors there are many jobs wherein no special risks are involved.

When risk is involved, government may be able to cope with it than a private enterprise that could be wiped out by an embezzlement for instance, that would be a relatively insignificant loss in a government operating budget. Suffice it to say that it is probably more valid to make judgments about job sensitivity based upon the nature of the job itself rather than whether the employer is a governmental or private entity.

A related question concerns access to licensing or regulatory agencies. Frequently private sector employment may require a license granted to those of "good moral character", such a phrase may be interpreted as permitting inquiry into criminal history. Though of course such inquiries would be appropriate, with respect to many licensed enterprises, some examples cause doubt as to whether the legislature gave serious thought to the question, especially where "good moral charater" is required for license as a dog groomer, for instance. Though the LEAA regulations accept a "good moral character" provision as sufficient authorization for access to simple arrest or non-conviction records, state licensing regulations should be examined to assure that criminal justice information access is appropriate to the licensed function.

A final aspect of the government vs. private sector access question involves the role of private security services. The last decade especially has seen tremendous growth in the private security industry in the United States. Partially because limited governmental resources do not provide adequate security coverage, and because of the often specialized need of the business world for investigative and security service, private security has grown to the point where conservative estimates are that those employees outnumber all of Federal, state and local law enforcement personnel perhaps by a factor of two or more. The recent increase of terrorist threats agains industrial leaders has accentuated the growth of private security. The question is how to deal with the private security industry for purposes of criminal justice information access. It is to classified as law enforcement, or the private sector, or in some special category.

The definition of a criminal justice agency in Title 28 excludes the private sector since law enforcement is defined as a governmental function. LEAA took this position after lengthy and careful consideration of the issue. One reason may be the matter of accountability, that is, a governmental agency is subject to some degree of monitoring and accountability on behalf of the public, whereas this may not be the case in the private sector.

This matter should be addressed so that it is clear where a state may choose to give private security access to criminal justice information under special circumstances and in accord with prescribed procedures. The NAC has prepared an extensive report on the private security industry, and than can be consulted.

SEARCH GROUP, INC.,
June 2, 1983.

Senator CHARLES MCC. MATHIAS, JR.,
U.S. Senate,
Committee on the Judiciary,
Washington, D.C.

DEAR SENATOR MATHIAS: On behalf of SEARCH Group, Inc., let me thank you for inviting SEARCH to testify at your Subcommittee's May 12th hearing on the privacy issues raised by the interstate exchange of criminal history records. Enclosed please find an edited transcript of our testimony.

You have also requested that SEARCH Group answer a question as to whether SEARCH is satisfied with the present system of policy control—that is, the operation of the interstate records exchange system by the FBI with advice from the advisory Policy Board. This is a very important and a very difficult question. However, the SEARCH Membership Group has not yet taken a position on this issue. SEARCH expects to give this matter considerable attention in the coming year. Accordingly, we will have to defer our answer until such time as the SEARCH Membership Group has given further study to this issue and has taken a formal position.

Thank you again for inviting us to testify and please do not hesitate to call on us if we can be of any additional help.

With best wishes.

Sincerely,

ROBERT R. BELAIR,
Counsel, SEARCH Group, Inc.

ADDITIONAL SUBMISSIONS FROM THE FBI

NCIC ADVISORY POLICY BOARD QUALITY ASSURANCE SUBCOMMITTEE, SACRAMENTO, CALIF., DECEMBER 7, 1982: NCIC STAFF PAPER

Topic No. 3

Methods to Improve Disposition Reporting.

Background

On March 31, 1982, the CCH File was reviewed to determine the volume of arrests in file without disposition information. The survey determined that, as of that date, 6,563,048 arrests were entered in the File, and disposition information was missing in 2,193,975 (33.42 percent) of the arrests. The arrests were tabulated by age to determine if any pattern of reporting could be developed. Analysis of the information determined that unless dispositions are reported within two years of the arrest, there is little likelihood that a final disposition will be reported at all.

Discussion

In order to determine how disposition reporting could be improved, a survey was conducted during October, 1982. This survey determined that 25 states utilize a disposition follow-up program to ensure that arrest dispositions are reported. There are obviously wide variances in the efficacy of these programs, as file information indicates that states with programs have disposition reporting percentages ranging from a high of 100 percent, to a low of 57 percent. Those states not having follow-up plans ranged from a high of 82 percent to a low of 20 percent. A review of the programs that were successful in achieving a high level of disposition reporting determined that each of these programs had a number of elements in common.

Successful disposition reporting programs use multiple-part forms that have been preprinted with a unique identifying number. A form developed in this manner has distinct advantages. The number preprinted on the form serves as a control mechanism for linking all actions that affect the defendant. The number can provide the arresting agency, the court, the central repository, and the national repository with a unique identifying number allowing each agency to locate the defendant's record. It allows for easier record matching in any disposition follow-up program. The multipart form allows the arresting agency to prepare the disposition form at the time of the arrest, and to submit the form with the arrest fingerprints. The other parts of the form can be used to follow the defendant through the judicial process, with appropriate parts being detached and sent to the central repository after final disposition.

Successful programs also incorporate a mandatory reporting time for dispositions. This reporting time varies from 30 days to two years after the arrest of the individual. At the time the arrest fingerprint is received at the central repository, a tickler date is established, enabling the central repository to send a follow-up when the mandatory reporting time is exceeded. In most instances the follow-up is computer generated and is preprinted with the unique identifying number as well as all identifying data relating to the subject. This requires the arresting agency or the court to enter only information relating to the disposition of the case, shifting a substantial burden from those agencies to the central repository computer system.

In addition to a mandatory reporting time, successful agencies also incorporate periodic queries once the mandatory reporting date has been exceeded. The periodic queries range from monthly to yearly, and incorporate the sending of a computer-generated form to the arresting agency and court, reminding them that the disposition is needed for this particular matter.

The final element in a successful disposition reporting program appears to be the placing of responsibility on either the court system or the central repository to ensure disposition reporting. Those agencies placing the responsibility for disposition reporting on the arresting agencies consistently showed the lowest level of disposition reporting. Those agencies having disposition reporting responsibility resting with the central repositories showed the highest level of reporting. Assignment of

responsibility to the court system resulted in a slightly lower level of submitted dispositions than in those states assigning responsibility to the central repository.

The III Subcommittee has previously discussed and recommended that dispositions be associated with each arrest count to the extent possible rather than placed in a separate "court segment" of the record. The disposition reporting form would be designed by each state to assist in accomplishing this goal.

Recommendation

(1) That the above serve as a model for individual states to develop disposition reporting programs.

(2) That a plan incorporating these features be developed and implemented for the NCIC Federal Offender File.

AGREEMENT: FEDERAL BUREAU OF INVESTIGATION NATIONAL CRIME INFORMATION CENTER—INTERSTATE EXCHANGE OF CRIMINAL HISTORIES BY MEANS OF THE INTERSTATE IDENTIFICATION INDEX (III)

The National Crime Information Center of the FBI, hereinafter called NCIC, agrees to establish and maintain for _____, a criminal justice agency, an index to criminal history records maintained in its system, as well as an index to all other data bases known to have criminal history data on specifically identified individuals, subject to the following provisions:

_____ agrees to abide by all present rules, policies, and procedures of the NCIC as approved by the NCIC Advisory Policy Board as well as any rules, policies, and procedures hereinafter approved by the NCIC Advisory Policy Board and adopted by the NCIC. In particular, _____ agrees to abide by minimum standards currently adopted, or those that will be adopted by the Board and NCIC in the future concerning the III. These standards include:

I. Fingerprint Identification Matters
II. Record Content and III Maintenance
III. Record Response under the III
IV. Accountability

A copy of the standards are attached and are incorporated by reference as part of this agreement.

NCIC reserves the right to immediately suspend the indexing of criminal history data for _____ when either the minimum standards or security and dissemination requirements approved by the NCIC Advisory Policy Board and adopted by the NCIC are violated. NCIC may reinstate these services in such instance upon receipt of satisfactory assurance that such violation has been corrected.

Either NCIC or _____ may, upon 30 days' notice in writing, discontinue participation in the Interstate Identification Index project.

The Agreement will become effective immediately upon being signed by the Director, FBI.

In witness whereof, the parties hereto caused this Agreement to be executed by the proper officers and officials.

Federal Bureau of Investigation, National Crime Information Center:
By: _____.
Title: _____ Director_____.
Date: _____.
State Criminal Justice Agency:
By: _____.
Title: _____.
Date: _____.

MINIMUM STANDARDS FOR III PARTICIPATION

To participate in the Interstate Identification Index (III), a state must meet the following standards:

I. Fingerprint identification matters

A. The state has a central state repositiory for criminal history record information with fingerprint identification capability, i.e., tha ability to match fingerprint impressions. Although full technical fingerprint search capability is desirable, it is not a requirement.

B. The state's central repository serves as the sole conduit for the transmission of arrest, judicial, and correctional fingerprint cards for criterion offenses within the state to the FBI Identification Division (single-source submissions). Submission of related final disposition reports and expungements to the Identification Division via

the central repository is desirable. Single-source submission of information to the FBI should not be unduly delayed by the state agency.

C. The central repository maintains the subject's fingerprint impressions or a copy thereof as the basic source document of each Index record and to support each arrest event in the criminal history record.

D. The central repository agrees to continue submitting all criterion arrest, court, and correctional fingerprint cards and, when possible, the related final disposition reports to the FBI Identification Division until such time as a study is completed regarding the National Fingerprint File and approval is given to submitting only the first arrest fingerprint card (single-print submission).

II. Record content and III maintenance

A. Each record maintained by the state contains all known arrest, disposition and custody—supervision data for that state.

B. The state agrees to remove or expunge the State Identification Number (SID) from an III record when corresponding record data no longer exists at the state level.

C. The state agrees to conduct a regularly scheduled audit to identify discrepancies and synchronize III records pointing to the state's data base.

D. Record completeness, accuracy and timeliness is considered by the state to be of primary importance and is maintained at the highest level possible.

III. Record response

A. The state agrees to respond immediately to III record request via NLETS with the record or an acknowledgment and notice when the record will be provided.

B. Record responses will have an alphabetic and/or numeric codes translated to literals (words or easily understood abbreviations) in order that the record responses can be readly understood.

C. The state agrees not to include in its III response any out-of-state criminal history record information maintained in its files.

IV. Accountability

A. A single agency within each state agrees to be responsible for ensuring that the standards of participation are met.

B. The state agrees to maintain records and provide dissemination in accordance with the civil and constitutional right of individuals reflected in the records.

C. The state agency executes a written agreement with the FBI to comply with the standards of participation.

March 2, 1981.

Hon. STROM THURMOND,
Chairman, U.S. Senate Judiciary Committee
Washington, D.C.

DEAR MR. CHAIRMAN: On January 7, 1980, I forwarded Senator Kennedy the enclosed letter to apprise the Judiciary Committee of a project being planned to test decentralization of the Computerized Criminal History (CCH) File of the National Crime Information Center (NCIC). This correspondence is to advise you of the project status as well as our plans to continue with its implementation.

The Florida Department of Law Enforcement has been selected as the state agency to begin the feasibility test, during which, NCIC will act as an index by maintaining personal identification information for records that have arrests only in Florida. The actual arrest and disposition records will be disseminated from the Florida State file.

Personnel from the FBI have worked with the Florida State personnel, the NCIC Advisory Policy Board, and its appointed subcommittee, as well as the Board of Directors for the National Law Enforcement Telecommunications System, Inc. (NLETS), and its Operational Procedures Committee to develop a detailed design and coordinate the project's implementation and evaluation. The review of system capabilities led to consideration of a number of design alternatives. Security and privacy requirements for record exchange were also identified. These considerations and other operational concerns have caused the original implementation to be delayed. The project, as now designed, is estimated to be operational in the fall of this year.

In 1979, when this project was in the conceptual stage, plans called for FBI NCIC to act as an index for Florida records by responding to an inquiring agency with information that the record could be requested from Florida. Record requests and

responses could be requested from Florida. Records requests and responses would be made by means other than the NCIC System. This approch was taken to avoid any applications which either were or could be erroneously construed as switching of messages for state and local law enforcement. During the detailed design of the project, the procedure of requiring an agency to first make an inquiry of NCIC, receive a response, and then send a second message by NLETS requesting the record was found to be undesirable since it placed an unnecessary burden on the user agency and does not take advantage of some capabilities that are already established in the affected systems.

The current project design calls for the NCIC to automatically notify the Florida system concerning inquiries. The notification will identify an agency that makes an NCIC inquiry matching with a Florida index record as well as identify the record by identification number. After receiving this information, the Florida system will prepare an automated summary record and transmit this record directly to the inquiring state or local agency via the NLETS network. The inquiry notification to be given to Florida by FBI NCIC is not message switching as defined by the DOJ Authorization Act, inasmuch as the notification message to be sent to Florida will be created from the index record and transmitted in a set format. The inquiry message will not be retransmitted or switched to Florida.

This approach to record exchange has received the approval of both the NCIC Advisory Policy Board and the NLETS Board of Directors. There are distinct advantages with NCIC notifying the project state concerning transactions that match on their index records. First, the operational impact on NCIC/NLETS users is reduced by not requiring them to transmit a separate message to Florida requesting the record. Secondly, Florida is assured that record inquiries are made with valid agency identifiers of agencies authorized access to criminal history records in accordance with policies of the NCIC Advisory Policy Board. Additionally, inquiry notification will be received by Florida in a fixed format necessary to meet the state's needs for replying with an automated response.

Project design will be finalized on March 10 in order to begin programming modifications. I trust this information will be helpful in keeping the Committee up-to-date on this project to decentralize the Computerized Criminal History Records.

Sincerely yours,

WILLIAM H. WEBSTER, *Director.*

Enclosure.

JANUARY 7, 1980.

Hon. EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C.

DEAR SENATOR KENNEDY: In my August 1st letter I apprised you of the status of the Computerized Criminal History (CCH) Program of the National Crime Information Center (NCIC) and of forthcoming meetings at which the Program's future would be explored.

As you are aware, the CCH File is presently a centralized one maintained by the FBI. This was not the architecture originally envisioned by us and is not in consonance with any proposed CCH concept of which we are aware. The March 6, 1978, Department of Justice study and concept paper ("Representative Viewpoints of State Criminal Justice Officials Regarding the Need for a Nationwide Criminal Justice Information Interchange Facility"), and the NCIC Advisory Policy Board's essentially identical proposal of March 12, 1978, commonly referred to as the Interstate Identification Index, envision each state maintaining and controlling the dissemination of its CCH records. It is our understanding that the responses elicited by the Office of Technology Assessment in the course of its present study of NCIC disclosed that the states, with only one exception, indicate a preference for either partial or total decentralization of state CCH records to their state of origin.

In September an ad hoc committee of the NCIC Advisory Policy Board requested as to conduct research and gather data which would assist its members in evaluating the practicality of returning state CCH records to their state of origin and maintaining at the FBI an index to those records which would consist of identification data only. The index would not contain information pertaining to an individual's arrest and subsequent contacts with criminal justice agencies. Specific areas which the committee is addressing include technical, managerial and fiscal impacts. It is the specific recommendation of this policy committee that until the desirability of interstate exchange is established and a system is successfully tested under operational conditions, arrest fingerprints and related information should continue to be contributed to the FBI Identification Division.

At the recently held NCIC Participants' Meeting several states volunteered to act as a pilot-integrated test facility for evaluating the feasibility of CCH decentralization. For these states we would return their single-state offender records (i.e., those records where all recorded criminal activity occurred within that state) and establish an index to these records in the NCIC host. When an out-of-state inquiry is made on one of these records, the NCIC index would indicate to the inquiring agency that a CCH record exists in a certain state and that a request for the record should be made directly to that state. The requesting agency could not, of course, make such inquiry through the NCIC system, but would do so by whatever means deemed appropriate (e.g., telephone, mail, teletype). This precludes the necessity for message switching in NCIC. The facility most likely to be used would be the National Law Enforcement Telecommunications Systems (NLETS). Managers of that system have assured us that their facility can accommodate the message traffic without any adverse impact.

Evaluation of the pilot test operation by the FBI will develop data on such matters as the number of inquiries made of the index, the number of these inquiries which were followed by a record request, the cost in human and fiscal resources in making this request, the number of requests denied by the record holder and the reasons therefore, the processing time and costs incurred by the record holding state, the time the response is transmitted, the time the response is received, the value of the response to the requester and whether or not the time delay resulted in any material diminution of the information's value, plus any other pertinent observations made by the requesting or record holding agencies. We anticipate, that the above procedure may subsequently be extended to decentralized multistate offender records.

We will furnish to you a date when the necessary procedures and system modifications by us and by the participating states will be completed and keep you advised of our progress. We anticipate that this effort will provide all interested parties with valuable information upon which future decisions regarding the CCH File can be made. We welcome your observations and suggestions.

Sincerely yours,

WILLIAM H. WEBSTER, *Director.*

JULY 15, 1982.

Hon. STROM THURMOND,
Chairman, Judiciary Committee,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: In May, 1981, representatives of the Federal Bureau of Investigation (FBI) and the United States Secret Service (USSS) met to update the current Memorandum of Understanding between these agencies. At that time, preliminary discussions were held to determine the feasibility of using the assets of the FBI National Crime Information Center (NCIC) System to aid the USSS in the discharge of its duties. Subsequently, on November 24, 1981, H. Stuart Knight, former Director, USSS, formally requested the Director, FBI, to consider placing into NCIC data on individuals considered by the USSS to be a threat to authorized protectees. The USSS indicated in its request that this NCIC application would be of valuable assistance to carry out this duty. The purposes of this proposed file would include the updating of the location of dangerous individuals between periodic review checks, the determination of location of dangerous individuals whose current whereabouts are unknown, the immediate identification/notification of such individuals' involvement in criminal activity which could be related to protectees, and the notification to an officer that an individual with whom he is dealing may be mentally unstable. This proposed file, therefore, would contain data on individuals for whom no arrest warrant is outstanding and would notify the USSS as to the location of an individual at a given point in time.

This application was presented to the Advisory Policy Board at its December, 1981, meeting at which time the Board requested additional information and a Department of Justice (DOJ) legal opinion. During the last six months the FBI NCIC Staff and the USSS designed the file and developed the following data for review. The file would contain the name, sex, date of birth, place of birth, height, weight, hair, and eye color of an individual considered to be a threat to authorized protectees of USSS.

Under 18 USC 3056 and Public Law 90-331 as amended, the USSS is mandated to ensure the safety of certain specified individuals. Under this mandate, the USSS

conducts extensive investigations on individuals who threaten or who may pose a serious threat to the safety of these protectees. Pursuant to the authority of the Attorney General under 28 USC 534 to acquire, collect, classify, and preserve identification, criminal identification, crime, and other records and to exchange these records with authorized officials of the Federal Government, the states, cities, and penal and other institutions, which authority has been delegated to me under 28 CFR 0.85, I would like to inform you of this proposed new file to be a part of the NCIC System.

The USSS advised the FBI that approximately 9,100 complaints are received each year and are reviewed in the above process, but that only an average of 300–400 of these are determined to be dangerous at any given time. The USSS advised the FBI that as of June 9, 1982, the names of 379 people were on this list. Of these, 182 are confined to penal institutions (some of them are classified as criminally insane) and 71 are confined to mental institutions. The remaining 126 are out on the streets. The persons who are not confined are those on whom the Secret Service would be entering data into NCIC.

This file proposal was presented to the NCIC Advisory Policy Board at its June, 1982, meeting. The Board, composed of top level criminal justice officials of Federal, state and local governments, recommended its adoption. I have approved this file and have obtained concurrence of the Attorney General.

The utilization of this new file will enhance the ability of the USSS to carry out its mandated duty of protection. It will enable the USSS to be alerted to pertinent activities of those most likely to commit a dangerous overt act such as was done against President Reagan and others who were attacked early last year.

Thank you for your continued interest in the NCIC System and its value to the criminal justice community.

Sincerely yours,

WILLIAM H. WEBSTER, *Director.*

AUGUST 3, 1982.

Hon. STROM THURMOND,
Chairman, Judiciary Committee,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: This letter concerns the Interstate Identification Index (III), a project being conducted by the National Crime Information Center (NCIC) in conjunction with participating state agencies. In January of this year, I sent you information about this phased approach to test an index in NCIC for facilitating the interstate exchange of criminal records maintained by state agencies.

The final testing of the first phase was conducted on schedule during February and March, 1982. Approximately 1.3 million records were involved in the two-month test. The records represented individuals with an arrest(s) in Florida, Michigan, North Carolina, South Carolina, Texas, or Virginia. Enclosed are the Phase I findings and a report of the III Subcommittee. The Subcommittee was established by the NCIC Advisory Policy Board to assist with the project design and evaluation.

The III Subcommittee, Board, and an III Evaluation Group (a diversified group appointed by the Board Chairman) have each evaluated the test data and concluded that the III method of record exchange is a success. The Board has recommended that the second phase of testing be conducted with additional state agencies. Functionally, Phase II calls for an index in NCIC to identify criminal records maintained in participating states and a Federal Offender File in NCIC. The Index will identify the FBI Identification Division as the record source for records in nonparticipating states to insure that the most complete records possible are provided. Enclosed is a system overview explaining the essential services that will be provided during Phase II.

The FBI is scheduling a technical conference August 10–11, 1982, for the states that will participate in the next test. Although the exact number is not known, about 16 states are expected to send representatives. The III development schedule (included in the enclosed III Subcommittee report) calls for implementation of testing in December of this year. Due to the time required for establishing an interface with the test states, the actual test period will probably begin about February 1, 1983. Additional subcommittee meetings, evaluation meetings and notices to Congressional committees are planned that are not specifically noted on the development schedule.

There has been considerable nationwide support expressed for III with many state and local criminal justice agencies expressing satisfaction with the project. SEARCH Group, Inc., and the National Law Enforcement Telecommunications System, Inc., (ELETS) have been providing their assistance. Because of this support and cooperation, we look forward to an improved system for the exchange of criminal justice information.

The enclosed material is intended to provide your Committee the most current information concerning the III. My staff is available to provide you any necessary clarification or additional details.

Sincerely yours,

WILLIAM H. WEBSTAR, *Director.*

Enclosure.

INTERSTATE IDENTIFICATION INDEX, PHASE II TEST

SYSTEM OVERVIEW

The Interstate Identification Index (III) is an automated system to provide for the interstate exchange of criminal history record information. Functioning as part of the National Crime Information Center (NCIC), the III will include the personal identifiers of persons with criminal arrests. The next phase of testing, as approved, will provide essential services.

1. An authorized criminal justice agency will be able to make an inquiry based on name and numeric identifiers (birth date, Social Security Number, etc.) to determine the existence of a criminal record matching the inquiry. A positive III response will contain additional identifying data to associate the record with the person of the inquiry (height, weight, race, fingerprint classification tattoos, etc.). The response will also identify the locations of the data base(s) maintaining the criminal history information. With this information, the agency can decide whether to request the record and determine the means of communicating the request (National Law Enforcement Telecommunications System, Inc., (NLETS), NCIC III, mail, etc.).

2. The III will provide a method for requesting a criminal history record once a person has been associated with an Index record, or when the person has been positively identified with a prior record through fingerprint comparison at the state or local level. Requests made on-line via NCIC III will result in automatic notification to the record holder(s) and will provide sufficient information enabling the holder(s) to respond. If the record is maintained only in the FBI Automated Identification Division System (AIDS), the record will be mailed to the requestor the following workday or shortly thereafter. If the record is on file in the NCIC Federal Offender File (FOF), the record will be automatically returned on-line via NCIC. If the record is maintained by one or more state agencies participating in III record exchange, the state(s) will respond via the National Law Enforcement Telecommunications System, Inc. (NLETS). On those occasions when a record is on file in a participating state(s) and the FOF, the requestor will receive mutiple on-line reponses (the FOF will provide the data for Federal offenders including any nonparticipating state data, and the participating state(s) will furnish its data). On those occassions when the record is on file in a participating state(s) and the nonparticipating state's data is in AIDS, the requestor will receive an on-line response from the participating state(s) and a mailed AIDS record.

3. The III will continually interface with participating state systems to provide status information regarding the states' records. When a person is arrested for the first time in a participating state, the state will be advised if the record is single-state (no Federal arrests or no arrests in other states) or multistate (arrests have occurred in other than the participating state). When the status changes from single-state to multistate or multistate to single-state, the participating state agency will be automatically advised. In all cases, the states' capability to provide records will be enhanced by knowing whether or not the state record is the complete record for the individual.

The participating state file referred to in this design is a criminal history record system maintained by a designated agency in a state and containing records based on arrest fingerprint cards submitted by arresting agencies within the state. A state referred to as an III participating provides records from its file upon receipt of inquiry notification from the NCIC III. For a state to be an III participant, it must meet the minimum standards for participation. The most recent information available indicates all but one state (Nevada) have centralized criminal history files, and one-half of these files are automated to some extent.

The AIDS File maintained by the FBI contains the complete records of all persons arrested for the first time and reported to the FBI since July, 1974 (some records are also maintained on first offenders from late 1973, and early 1974, as well as selected manual records that have been converted to the automated system). Records contain arrest, disposition, and supervision/custody data reported to the FBI Identification Division. AIDS is an international automated processing system not accessable by outside agencies via telecommunications.

The Federal Offender File (FOF) will exist in NCIC primarily to house the records of persons arrested for a Federal offense, and will be developed as a replacement of a present Computerized Criminal History (CCH) File. Other records included will depend largely on the desires of CCH participants when the CCH File is discontinued.

Minimum standards for III participation and the functional design for Phase II testing have been approved by the III Subcommittee and the NCIC Advisory Policy Board at their meetings in June, 1982. Proposed technical specifications are being presented for consideration of state agencies that will be participating in the test.

FEBRUARY 4, 1983.

Hon. STROM THURMOND,
Chairman, Judiciary Committee,
U.S. Congress, Washington, D.C.

DEAR MR. CHAIRMAN: Enclosed is a general information paper concerning the Interstate Identification Index (III) second phase test, and the current III Development Schedule. This letter and the disclosures are to apprise your committee of the progress being made with III, a project of the National Crime Information Center (NCIC), FBI Identification Division, and participating state agencies. In August, 1982, I sent you information concerning this test and essential services to be provided.

On August 10–11, 1982, the FBI hosted a technical conference attended by representatives from 12 states, the National Law Enforcement Telecommunications Systems, Inc. (NLETS), and observers from the state. Based on the technical and operational requirements, 15 states advised that they would be able to participate in the second test phase. The 15 states are:

California
Colorado
Florida
Georgia
Michigan
Minnesota
Nebraska
New Jersey
New York
North Carolina
Pennsylavnia
South Carolina
Texas
Virginia
Wyoming

For evaluation purposes, the second phase test is planned to begin February 7, 1983, and continue through April 30, 1983. NCIC, the FBI Identification Division, and the participating states will be conducting surveys of criminal justice agencies using the III and collecting other empirical data to evaluate the decentralized exchange of criminal records.

On January 13, 1983, the FBI hosted a one-day meeting of the III Evaluation Group (a diversified group appointed by the Chairman of the NCIC Advisory Policy Board). The purpose of the meeting was to provide a status report and plan for the system's evaluation.

The III project continues to receive nationwide support from criminal justice agencies and others interested in improved criminal justice services. The planned test will provide additional insight concerning the decentralized exchange of records. My staff is available to provide any necessary clarification or additional details. I will keep you advised of all critical stages in the testing process.

Sincerely yours,

WILLIAM H. WEBSTER, *Director.*

Enclosures (2).

NATIONAL CRIME INFORMATION CENTER INTERSTATE IDENTIFICATION INDEX (III)

GENERAL INFORMATION

This paper is to explain in general detail an enhancement to the NCIC System that will allow you to use your computer terminal to request many criminal history

records from the FBI Identification Division files as well as various state files. For evaluation purposes the testing of the second phase of III will be conducted during February, March, and April, 1983.

Agencies in these 15 states will select records from their files to provide directly to requesting agencies:

California
Colorado
Florida
Georgia
Michigan
Minnesota
Nebraska
New Jersey
New York
North Carolina
Pennsylvania
South Carolina
Texas
Virginia
Wyoming

Records of nonparticipating states will be provided by the Identification Division, and Federal arrests will be provided by an NCIC Federal Offender File (FOF).

The program objective is "to make available to the criminal justice community, in a timely manner, criminal history records necessary for them to meet their objectives." To accomplish this objective, the records of about seven million persons will be indexed initially in the III. An Index record will contain an individual's name, aliases, physical description, identifying numbers, fingerprint classification, and the location(s) of the criminal record(s). An authorized criminal justice agency will be able to make an inquiry (QH message) based on name and numeric identifiers (birth date, Social Security Number, etc.) to determine the existence of an Index record which may match the inquiry.

The Index records will be established in the NCIC III from two sources:

(1) Records in the FBI Automated Identification Division System (AIDS); and

(2) Records in the NCIC Computerized Criminal History (CCH) File that are not also in AIDS via the III and FOF. Each night, the NCIC computer will produce a computer tape containing the FBI numbers of requested AIDS records to be printed and mailed. Arrests occurring in a participating state(s) will not appear on the AIDS record when the record is indexed for the state(s). Likewise, Federal arrests will be deleted if the Federal arrests were provided by the NCIC FOF. The following will appear on each record: "Since no fingerprints accompanied your request, the FBI cannot guarantee in any manner that this material concerns the individual in whom you are interested. Arrest cycles representing arrests in states participating in the Interstate Identification Index System or Federal offenses are not included."

NCIC FEDERAL OFFENDER FILE RECORDS

The NCIC FOF will provide Federal arrest data and related information (final disposition, custody, etc.). As an interim measure to support the transition from the CCH File to III, the FOF will also contain some data for states not providing records via III. This nonparticipating state data is currently available via the CCH File but it is not automated in AIDS (i.e., it is in a "manual" FBI Identification Division record). In order to continue providing this data in an automated manner, it is necessary to include it in the FOF. To include only the Federal offense data in the FOF when this other information exists at the FBI would result in an incomplete record. Therefore a record from the FOF may consist of Federal offense data and non-Federal offense data.

RETENTION AND USE OF INDEX RESPONSES

The NCIC Index response will serve as the key or "table of contents" to let you know what records exist for a person. This response should be retained and kept with the individual state, AIDS and/or FOF record response(s) so that the person using the response(s) can ascertain when all parts have been received.

ADDITIONAL CAPABILITIES

In addition to providing name-search and record-request capabilities, the III will enhance the participating states' ability to respond to fingerprint submissions. The III computer interface will advise state computers which records are "single-state" (no Federal arrests or arrests in other states) or "multistate." This status information originates in the FBI Identification Division from fingerprint cards submitted by arresting agencies.

This service becomes an integral part of the processing of fingerprint cards by state identification bureaus. Once an offender is indexed in III, the state bureau can

better serve agencies within the state since it will know when additional records are maintained elsewhere. If the state can identify a fingerprint card with a prior record, local agencies can be provided a complete record by the state without waiting for the fingerprint card to be processed by the FBI.

PROHIBITED USES

During this phase of III testing, inquiries or record requests for employment or licensing purposes are prohibited. This policy is partially the result of inconsistent state laws governing release of criminal records for these purposes. III inquiries and resulting record responses must serve official criminal justice purposes.

INDIVIDUAL ACCESS, REVIEW AND CHALLENGE

Record requests via III for individual access and review will not be allowed since participating states desire to follow state dissemination procedures for this purpose.

The subject of a record indexed in III may submit a written request directly to the FBI, NCIC Section, Washington, D.C., 20535, to obtain information concerning his or her record. The request must be accompanied by a set of rolled-inked fingerprint impressions, name, date and place of birth. The NCIC will provide a copy of the Index record and FOF record, if such exists. If the record is indexed for a participating state(s), NCIC will provide the name and address of the appropriate state agency(ies) to contact.

III EVALUATION

For a three-month period beginning February 7, 1983, operational statistics and user comments will be recorded to assist in evaluating the III test. Your personnel may be contacted as part of a user survey to answer specific questions regarding the acceptability of III record responses. Any additional comments or observations should be forwarded to the FBI, NCIC Section, Washington, D.C. 20535.

Specific operational instructions for using the III are being prepared and will be forwarded to you for information and training of NCIC operators.

INTERSTATE IDENTIFICATION INDEX (III) DEVELOPMENT SCHEDULE

Description	Estimated time to complete	Start/event date
Begin study and analysis of national fingerprint file (NFF) concept and establishment [1].	10 mo	November 1982.
Synchronize AIDS/State files for initial establishment of III records [1].	3 mo	November 1982.
Test III/State interfaces [1]	7 weeks	Dec. 6, 1982.
III evaluation group meeting [1]	1 day	January 1983.
Advise congressional committees regarding state participation and plans for phase II test (following the December meeting of NCIC advisory policy board) [1].	1 day	January 1983.
Add States to III test [1]	10 weeks	Jan. 17, 1983.
Collect phase II test data [1]	3 mo	Feb. 1, 1983.
Compile phase II test data [1]	6 weeks	May 1, 1983.
Meeting of III evaluation group to evaluate phase II test [1]	2 days	July 1983.
III subcommittee meeting/NCIC advisory policy board to review phase II test and consider expansion to include additional States [1].	30 days	August–September 1983.
Advise congressional committees regarding phase II test results and plans for future development [1].	1 day	August 1983.

[1] Addition or modification to previously approved development schedule.

Newspaper and Magazine Articles

[From the Daily News Record, Oct. 22, 1982]

CCH System Is Viewed as a Mixed Blessing

Washington.—Congressional investigators believe computer and communications technology offers the long-sought potential to greatly upgraded nationwide exchange of criminal history information.

This would greatly assist criminal justice decisions, according to the Office of Technology Assessment.

Consideration of a national computerized criminal history (CCH) system or network, however, raises complex and fundamental questions about using the information obtained and managing and controlling the system itself.

CHH, OTA notes, has important implications for employment and licensure, Federal-state relationships, and civil and constitutional rights, as well as public safety and administration of justice.

Most of the building blocks for CCH are already in place, Congress was told. The FBI's National Crime Information Center (NCIC) and Identification Division (Ident) both have computerized criminal history files.

Some 27 states also have such files at their disposal. Seven other states have a computerized name index to their manual files, and 10 more are implementing a computerized index.

The emerging consensus among Federal and state criminal record repository and law enforcement officials appears to favor the Interstate Indentification Index concept.

In this plan, only Federal offender records and an index to state offender records would be maintained at the national level, along with a national fingerprint file on criminal offenders.

Since 1970, Congress has voiced concern about the completeness and accuracy of criminal history records, OTA noted. It concluded that record quality has improved, but significant problems persist, especially with regard to court disposition reporting.

Congress also is concerned about non-criminal use of criminal history records for employment and licensing and security checks. This use is allowed under many state and Federal laws although definitions of authorized users and policies on record dissemination vary widely among jurisdictions.

OTA suggested, in its review, that Congress could consider various options. These include prohibiting non-criminal justice access to a national CCH system; permitting such access only to records with disposition or conviction information; or resolving existing conflicts between and among state and Federal laws but otherwise maintaining the status quo.

[From the Reading (Pa.) Eagle, Oct. 25, 1982]

National Crime Computer Technologically Feasible

Washington.—A computer system capable of spitting out arrest and conviction records nationwide is technologically feasible, but could also be abused, a congressional study says.

The study by Congress' Offfice of Technology Assessment said such a system could improve the criminal justice system by providing information useful in police investigations, booking, pretrial release, the setting of bail and sentencing.

But the study warned that because much of the information would be sensitive and prone to misinterpretation, it would be necessary to write and enforce strict standards that would protect an individual's rights.

To be successful, the government would have to take an active role in devising and organizing the system and help to fund it, said the report, requested by Rep. Don Edwards, D-Calif., chairman of the House Judiciary Committee's civil and constitutional rights subcommittee.

The report "makes clear that there are no insurmountable obstacles to the establishment of a national computerized criminal history system," said Sen. Charles Mathias, R-Md., who heads a subcommittee on criminal law.

"But the records of the system must be complete and accurate; they must be safeguarded against improper access and dissemination; and their contents must be limited to the minimum necessary to accomplish the system's goals."

The report suggested it might be necessary to completely prohibit "non-criminal access" to the information, to such entities as prospective employers and some licensing agencies.

The office said the information storage capabilities of different states vary—as do policies on the type of information compiled and to whom it can be released. That would make it essential for the government to take a strong lead in implementing the system, the report said, adding that some financial help to states with less sophisticated indexing systems might be required.

In lieu of complete prohibition, access to those other than law enforcement officials should be restricted to details of convictions, not just arrests, the report said. The office said providing arrests records as well could be particularly harmful to members of minority groups.

"For example," the report said, "the percentage of blacks with arrest records has been estimated at 30 percent nationwide and over 50 percent in some cities. In states like California, blacks are more likely than are whites to be arrested, to have the arrests reported . . . but then be released without formal charging.

"When used in employment decisions, for example, arrest-only criminal history information can have a disc. ninatory effect," it concluded.

[From the Plain Dealer, Oct. 25, 1982]

Study for Congress Sees Crime Data Bank Peril

Washington.—Congress should safeguard Americans' civil and constitutional rights before it authorizes a central computerized repository for criminal history information, according to a congressional study.

The study by the Office of Technology Assessment said problems in such a computerized system could result because of incomplete records on the final disposition of criminal cases.

Thus, a licensing board or employer with access to the criminal history system might find that the person being considered for a license or job was charged with a crime but not necessarily whether he was acquitted or convicted.

Although the overall quality of records kept by the federal and state criminal justice systems has improved over the past 12 years, the OTA study said there is a significant gap in reports of case disposition.

"On the average, about one-third of court dispositions are not being reported to state criminal record repositories," the study said.

To protect a person's civil and constitutional rights, the study said, Congress could bar people not connected with the criminal justice system from using a computerized crime history repository or allow them access to only those records that include case disposition.

The report said Congress also could strengthen case reporting requirements and possibly provide money to improve record quality.

The study said computer and communication technology has the potential to improve the nationwide exchange of criminal history information substantially. It said that in general there are no insurmountable problems in creating a national computerized system of such information.

The FBI and 27 states now have computerized crime records. Another seven states have a computerized index to manual files and 10 more are in the process of indexing manual files by computer, according to the report.

[From the New York Times, Oct. 25, 1982]

Some Criminal Records Sent Out by F.B.I. Are Found To Be Inaccurate or Incomplete

(By David Burnham)

Washington, October 24.—Congressional researchers have found that almost half of a sample of criminal history records that the Federal Bureau of Investigation sent to the police, state agencies, banks and other institutions throughout the United States were incomplete or inaccurate.

In a report made public today, the researchers said this and other problems found in the system of Federal, state and local agencies that collect, distribute and use criminal records have raised "difficult questions" about how the system should be managed and controlled.

The report says that before Congress authorizes a national computerized system of record-keeping and distribution, it should consider the impact the system would have if it were misused or if incomplete or inaccurate records were distributed.

The researchers at the Office of Technology Assessment, an arm of Congress, examined the maze of more than 64,000 criminal justice agencies that hold and exchange more than 15 million records of individuals who have been arrested at some time.

Because criminal history records are used by different parts of the criminal justice system and by other institutions, their completeness and accuracy have a far-reaching impact on many aspects of life.

The report emphasized that a national computerized system to exchange criminal records would provide more complete and timely information and thus could be expected to improve such processes as criminal investigations, police booking, bail decisions and presentence investigation. But it urged Congress to consider the many other less obvious effects before deciding whether overall legislation was needed to govern operation of the system.

One subject of concern is what happens when outsiders use criminal history records. More and more, the researchers found, the records are being used by state licensing boards, employers and many other civil institutions to decide whether an individuals should be permitted to practice a profession, be hired or be admitted to a training program.

The report said criminal records may be properly used to screen individuals who might pose a risk to co-workers, other citizens or the safekeeping of valuable assets. But because so many Americans have been arrested at some time and because their records often do not indicate the case was resolved, the question of their use warrants Congressional consideration, the report said.

36 MILLION SAID TO HAVE RECORDS

It said the best estimate was that 36 million Americans, nearly 30 percent of the total work force, had criminal records held by Federal, state and local repositories and "thus were potentially exposed to employment disqualification because of an arrest record."

But of the 36 million, the report continued, 35 percent had no arrest for a serious crime and only one arrest for a minor crime; 24 percent more had more than one minor arrest but no major ones. Thus, less than half of the total, 41 percent, had been arrested for a serious crime. Serious crimes, by the F.B.I. standard, include murder, rape, robbery, burglary, felonious assault and auto theft; minor ones include other felonies and misdemeanors such as drunkenness and lesser assaults.

Another problem was the degree of accuracy and completeness of the records, which generally originate with local police agencies but are collected and distributed by two separate F.B.I. systems. In 1979 researchers for the Office of Technological Assessment took a sample of 333 records, about half from each system, and compared it with the local records.

In one of the systems, 29.6 percent of the sample records contained no final disposition of the case, and an additional 20.2 percent of the records contained information on disposition, charges or sentences that was inaccurate. In the sample from the second F.B.I. system, 27.2 percent contained no disposition and 19.4 percent were inaccurate.

Thus, according to the report, a total of 49.8 percent of the sample of one F.B.I. system and 46.6 of the other were incomplete or inaccurate.

The report also recommended consideration of the potential that a computerized system could be used to monitor or track "the lawful activities of individuals or organizations."

SURVEILLANCE OF PAST CITED

"To understand this concern," the report said, "one must remember that the debate over the national computerized criminal history system began in the late 1960's and early 1970's, when the F.B.I. was engaged in domestic political intelligence and surveillance activities with respect to, for example, civil rights and anti-Vietnam War leaders and groups."

The report noted that as of September the Justice Department had agreed to a Secret Service request to place in the F.B.I. computer systems those persons considered a threat to officials guarded by the service. That would mean the gathering of intelligence data on "individuals not formally charged with a criminal offense," it said.

Other questions the report said Congress might want to consider included who should exercise policy control over the operation of a computerized system, what kind of criminal records it should handle, what standards of completeness and accu-

racy should be required and the extent to which the records should be available to outsiders.

Although the report contained no comment from the F.B.I., bureau officials last summer strongly objected to an earlier draft of the report on several grounds, noting that at least some of its underlying research was out of date. The officials in charge of the study defended the quality of the research.

[From the New Haven (Conn.) Register, Oct. 26, 1982]

Keeping Track of Criminals

A report released this week raises some important questions about the wisdom of establishing a national computer network containing information on criminals. In summary, the report says there is no technician problem to establishing such a network, but there is a critical need to balance the benefits to be gained with the possible dangers and with the need to protect citizens' rights.

Central to the report, prepared by the Congressional Office of Technology Assessment, was a finding that almost half of the records now supplied to local police forces and other agencies by the Federal Bureau of Investigation are either inaccurate or incomplete. The researchers discovered that 30 percent of a sample of those records contained no information on the final disposition of a criminal charge, and that an additional 20 percent of the records contained inaccurate information on the disposition of the charge.

The large percentage of faulty records is especially alarming considering the fact the congressional researchers found that FBI records are being used increasingly by state licensing boards and other civil agencies to determine whether a person should be admitted to a profession, hired, or approved for a training program. Conceivably, persons who were arrested but later cleared of all charges might be refused a license or employment on the basis of incomplete or inaccurate records.

This problem is compounded by the fact that while 36 million Americans have arrest records, a third of those have been arrested only once and for a minor charge. The establishment of a national computer network for criminal records might expose to disqualification for jobs or professional licenses millions of persons who had gotten into a minor jam with the law in their youth.

In themselves, the problems discovered by the researchers shouldn't rule out the establishment of a computer network of criminal records. Advocates of such a network correctly point out that it would enable police to obtain information on criminals quickly enough to be of assistance in solving many crimes, and that it would aid in booking, pretrial release, the setting of bail and sentencing. Such a network certainly would be a valuable tool for our criminal justice system.

However, it should be clear that as valuable as the network would be, there are dangers. There is a need to guarantee that the system does not become a means to harass or punish innocent citizens or those citizens who may have committed a minor crime at one time in their life.

Safeguards must be written into any centralized stockpiling of criminal records. One safeguard, for example, must be that the records are complete, that is, that they contain information not only on an arrest, but on the final disposition of the case. Another safeguard must be that the records be made available only for very specific purposes such as valid criminal investigations. If the use of a nationwide network of criminal records can be circumscribed with such safeguards, it may prove a valuable tool in the fight against crime.

[From the San Antonio Express, Oct. 28, 1982]

Complete Information

A congressional study has come to a sound conclusion on a national computerized repository for criminal records.

Congress was cautioned by the Office of Technological Assessment, which did the study, to safeguard constitutional rights before it approves a repository.

Any records in the system should show the final disposition of a case. The repository should not show that an individual had been charged without showing conviction or acquittal.

The study said records kept by federal and state criminal justice systems have improved but still have some gaps. About one-third of court dispositions are not being sent to state criminal repositories, it found.

Law-enforcement agencies need to have current information on suspects but that information must be accurate and complete.

[From the Computerworld, Nov. 1, 1982]

NATIONAL CCH SYSTEM NEEDS LEGISLATION: STUDY

(By Jake Kirchner)

WASHINGTON, D.C.—A national computerized criminal history system under development by the Federal Bureau of Investigation now has wide approval among the nation's law enforcement officials, but legislation probably will be needed before it can be fully implemented, according to a new congressional study.

In a report scheduled for release this morning, the Office of Technology Assessment (OTA) noted that federal efforts to automate national criminal record exchanges have long been slowed by technological, jurisdictional, constitutional and cost problems. Although the FBI has successfully tested a new system concept, most of the policy issues remain unresolved, the study said.

The OTA report, in the works for several years, has already received generous praise from several members of Congress who indicated it will go a long way toward finally concluding the computerized criminal history debate. But the study is probably not the last word on the subject. Earlier drafts were strongly criticized by the FBI for allegedly relying on faulty and old data.

For that reason, the House Judiciary Committee has asked the General Accounting Office to conduct another, shorter term study on bureau involvement in national computerized criminal history system development.

Meanwhile, the FBI continues to test its Interstate Identification Index (III), a proposal to maintain at the federal level an index to state-held criminal records. The FBI would keep records only on federal offenders and operate the index so that state law enforcement agencies can determine what other jurisdictions hold data on specific individuals.

Although there are other computerized criminal history systems that are feasible, the OTA researchers found an "emerging consensus among federal and state criminal record repository and law enforcement officials" favoring the III plan. "However," the report said, "many states, even some of those strongly supporting III, noted a variety of implementation problems which might preclude their participation, in some cases for years."

Among the unresolved issues noted by OTA are:

The extent that a national computerized criminal history system is accessible for noncriminal justice purposes. There are conflicts between federal and state laws on how criminal records can be used and by whom, OTA pointed out, saying use of such data for employment and licensing purposes raises serious questions of privacy, legal due process and racial discrimination.

The balance of authority and power between federal, state and local government matters. Some states are reluctant to share their jurisdiction over criminal justice with the federal government, OTA said.

Cost. Finding the money to participate in a national computerized criminal history system will be difficult for states given today's economy and particularly hard for states that do not have well-developed computerized criminal justice records systems of their own, the report said.

Surveillance potential. "Concern has been expressed about the possible use of a national computerized criminal history system by federal agencies—and particularly the FBI—for monitoring or surveillance of the lawful activities of individuals or organizations."

OTA noted recent FBI pledges not to use its access to a national system for surveillance. However, because of a limited use of the agency's National Crime Information Center (NCIC) systems for that purpose in the early '70s, Congress is reluctant to approve a system that contains even the potential for such surveillance.

[From the Los Angeles Daily Journal, Nov. 26, 1982]

JUDGE ORDERS STATE TO LIMIT RELEASE OF ARREST RECORDS

(By Philip Carrizosa)

SAN FRANCISCO.—An Alameda County judge has ordered state officials to stop the practice of distributing arrest records to public employers and state licensing agencies when the arrests do not result in convictions.

Superior Court Judge Winton McKibben issued the injunction Monday after finding that the practice by the Department of Justice violates an individual's right to privacy as guaranteed under Article I, section 1 of the California Constitution.

In so doing, McKibben also held unconstitutional several provisions of the state education, penal, and labor codes that require the Justice Department to furnish the records, upon request, to a number of government agencies for employment purposes.

A lawyer for the Justice Department said Wednesday that the ruling would prevent the release of certain arrest records to the State Bar, the agency that licenses attorneys to practice in California.

The orders were issued in *Central Valley Chapter of 7th Step Foundation* v. *Younger,* Alameda Sup. Ct. 497394-6, a class-action suit filed in 1977 by the foundation, a group which helps ex-convicts re-enter society and find jobs. The foundation, represented by the Legal Aid Society of Alameda County, argued that the distribution of the arrest-only records leads to discrimination against arrestees because public employers and licensing agencies are led to believe that the would-be employee was convicted when, in fact, the charge may have resulted in acquittal or dismissal.

The case was initially dismissed by Alameda Superior Court Judge Gordon Minder in 1977, but the First District Court of Appeal reinstated the case in *Central Valley Chapter of 7th Step* v. *Younger,* 95 Cal.App.3d 212 (1979), saying the plaintiffs had stated a prima facie case.

TWO-PART ORDER

McKibben's order, issued Monday, came in two parts. The first prohibits the Department of Justice from disseminating any arrest record containing arrests without convictions to community colleges or public employers such as cities, counties, local districts and state agencies, for employment evaluation purposes.

Under that portion of the order, conviction records may still be distributed to community colleges and public employers and nonconviction data, including arrest records, may still be distributed for evaluation of would-be peace officers.

In the second part of the court's order, the Department of Justice was prohibited from disseminating any arrest records indicating that an individual has successfully completed a pretrial diversion program to any employer or licensing agency in California.

Neither of the court's orders prevents the distribution of use of arrest records by law enforcement groups for criminal justice purposes, however.

Deputy Attorney General Jean Borden said the Justice Department considers the first portion of McKibben's order to be moot because the department does not release "non-conviction" data to community colleges or local governments anyway.

But the second part of McKibben's order, Borden said, clearly prohibits the release of information regarding pretrail diversions to state licensing agencies as the State Bar or the state Board of Medical Quality Assurance. Only agencies that provide certifications, rather than licensing—such as the state Commission for Teacher Preparation—are not covered by the order, she said.

LEGAL DUTY CLAIMED

Borden said the department defended its release of the records on the ground that the statutes imposed a mandatory obligation which the state Legislature specifically authorized.

The suit, which was filed against then-Attorney General Evelle Younger and the chiefs of the Department of Justice's records division, is a class action. Aside from the foundation, the plaintiffs consist of two unnamed Alameda County residents who claim they were denied employment by the county after officials obtained copies of their arrest records.

One of the "John Doe" plaintiffs said he had been arrested twice on burglary and robbery charges, but had never been convicted. In one case, he was found not guilty and in the other case, criminal charges were never filed.

Also joining in the suit was an Oakland resident who contended that the distribution of the arrest-only records constituted an illegal expenditure of taxpayer monies. Peter Sheehan of the Alameda County Legal Aid Society said McKibben's order will affect "thousands of cases" in which records have been released. He said discovery in the case has revealed that the department has more than 100,000 follow-up entries dating from 1980 that have not been logged in to update the arrest records.

Borden said she had no information on how many arrest records are provided annually to public employers and agencies. But, she said, data in the department's budget report showed that the department does provide an arrest record in 25 percent of the cases where a request for the information is made.

Borden said no decision has been made on whether to appeal McKibben's decision.

The ruling comes on the heels of a warning last month from a congressional study group. The study by Congress' Office of Technology Assessment said that providing arrest records alone could be particularly harmful to minority groups in their efforts to find employent because minorities tend to have higher arrest rates.

"When used in employment decisions, for example, arrest-only criminal history information can have a discriminatory effect," the report said. The study suggested that it might be necessary to completely prohibit access to the information by prospective employers and some licensing agencies. In lieu of such a broad prohibition, however, the study said access for anyone but law enforcement officials should be restricted to details of convictions, not just arrests.

The study was requested by Rep. Don Edwards, D-San Jose, chairman of the House Judiciary Committee's civil and constitutional rights subcommittee. The study said that a nationwide computer network capable of providing a detailed criminal history of individuals is technologically feasible, but warned that safeguards would be needed to avoid potential abuses.

[From the New York Times Sunday Magazine, Dec. 13, 1982]

How Long Should the Arm of the Law Be?

THE F.B.I.'S PLAN FOR A GREATLY ENLARGED CENTRAL DATA BANK INCLUDING PAST ARREST RECORDS HAS STIRRED DEBATE OVER THE DANGERS

(By David Burnham[1])

Early next year, the Federal Bureau of Investigation will begin testing a communications system in which inquiries about criminal suspects from all over the United States will be funneled through an F.B.I. computer in Washington to the computers of 17 states.

The experimental project, which is called the Interstate Identification Index, is part of an F.B.I. drive to vastly enlarge the scope and purpose of a 16-year-old communications network that already links tens of thousands of state and local criminal-justice agencies.

The primary purpose of the project is to devise a national communications system through which a policeman in New York, a prosecutor in Chicago or a judge in Los Angeles will be able to determine swiftly whether the suspects they are holding have ever been arrested in any other state.

The F.B.I. and most law-enforcement officials are convinced that speeding the exchange of information about an individual's past contacts with the criminal-justice system through such a network will reduce crime.

Attorney General William French Smith is enthusiastic about the project. "I believe the Federal Government should do everything possible to provide state and local authorities with timely and reliable information about today's highly mobile criminals," he said in a speech last year.

Law-enforcement officials argue that instant access to the records of a suspect's criminal past will help them to decide quickly whether to arrest a suspect, or to identify the most likely suspect from a group of suspects, and will help judges to set adequate bail for defendants who may have serious records in other states.

In addition, as one Michigan law enforcement official recently told the F.B.I., the system would protect the lives of policemen. Speaking of a case, the official said: "The record indicated the subject had been arrested and convicted in Florida of two

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[1] David Burnham is a reporter in the Washington bureau of the Times. This article is adapted from his book "The Rise of the Computer State," which will be published by Random House in May.

assaults, one of a police officer. This information and any information of like nature which may come back upon inquiry is without doubt of great value and benefit to officers in the field."

Experienced law-enforcement officials acknowledge, however, that the rapid transmission of criminal-history-records may be less helpful than is commonly thought. For one thing, a majority of violent criminals do not move from state to state. Also, many criminals are apprehended as a result of testimony by their victims or by bystanders, rather than by the information on their records.

Moreover, a number of criminal-justice officials, members of Congress and former White House computer experts are worried that, besides not providing a panacea for the crime problem, the F.B.I. plan could upset the constitutionally established balance of power between the states and the Federal Government, could improperly deny people jobs and could encroach upon civil liberties.

Even the large computerized network that now links the F.B.I. and thousands of Federal, state and local criminal-justice agencies is far from perfect. This current system is used for such simple purposes as helping law-enforcement agencies identify persons who currently are wanted for arrest or for locating stolen property such as automobiles. The controversy over the expansion proposal centers on its wider purpose: to use this massive network not only to determine whether a person is currently wanted by distant authorities, but to make it a system capable of providing a summary of a suspect's arrests.

Policemen routinely use the current system more than 300,000 times a day to answer such questions as whether a car is stolen. Sometimes, however, even this information is wrong or misleading. At 9 P.M. on March 24, 1980, for example, Michael Ducross turned his 1976 Pinto into a shopping center in Huntington Beach, Calif. Almost immediately, the flashing red lights of a police car filled his rear-view mirror. He had made an illegal left-hand turn. The patrolman, using his two-way car radio, asked for a check to determine whether Mr. Ducross was wanted for arrest. A clerk in the Huntington Beach police station punched Mr. Ducross's name into a computer terminal. The inquiry wa flashed to a computer file in Sacamento. Nothing. Then it was switched to the F.B.I.'s National Crime Information Center in Washington.

The center is a nationwide electronic bulletin board where policemen can list the names of persons wanted for arrest and can post information about stolen property such as cars, guns, securities and boats. The center's computer contains up-to-date information about nine million stolen items and about more than 190,000 persons actively being sought by law-enforcement agencies. This F.B.I. center is one of the largest and most complicated communications systems in the world. There are more than 100 direct lines to criminal-justice agencies all over the United States. Some of these lines, in turn, are linked to smaller communications networks operated by more than half of the states, a number of cities and a few Federal agencies. The system provides 64,000 investigative groups, including police departments, prosecuting offices and other organizations, direct or indirect access to the central computer in Washington.

In the case of Michael Ducross, the Huntington Beach patrolman was told that the records showed Mr. Ducross was wanted by the Federal Government because a decade before—on Christmas Eve of 1969—he had gone AWOL from the Marine Corps. Based on this, the police took Mr. Ducross to the prison at Camp Pendleton. After holding him for five months, the Marine Corps dropped the charges and he was freed to return to this wife and job. Mr. Durcoss says the Government released him after it discovered he never had been AWOL and that he had left the Marine Corps in 1969 under a special discharge program for which he was eligible as a North American Indian. The Marine Corps said he was discharged without court-martial "for the good of the service."

With large computer systems, furthermore, the illegal acquisition of information frequently can be as much of a problem as inaccurate information. This summer, for example, a private detective in St. Louis was fined $10,000 by a Federal judge after he pleaded guilty to the misdemeanor charge of improperly extracting information from the F.B.I.'s computer.

According to Robert T. Haar, the assistant United States attorney who handled the case, the private detective, from 1978 to 1980, paid at least four policemen in the area to make a total of about 500 inquiries of the local computerized system through their department terminals. Inquiries to the local system were automatically bounced to one file in the F.B.I.'s computer in Washington. Mr. Haar said the inquiries involved such matters as divorce cases and investigations the detective was conducting for local attorneys.

A recent study by Kenneth C. Laudon, formerly of the John Jay School of Criminal Justice in New York and now professor of computer applications at the New York University Graduate School of Business, found that such cases of misinformation were not isolated events—that almost one-fifth of the warrants in the F.B.I.'s wanted-person file were flawed at the time of the study. Researchers found, for example, that 10.9 percent of the warrants reported by the F.B.I. as outstanding already had been cleared or vacated. In 4.1 percent of the cases, although the F.B.I. records showed an outstanding warrant, there was no record of the warrant in the local agency. The balance of flawed cases involved other problems.

While a succession of study groups have agreed on the need for an exchange of information between the police, prosecutors and courts, the plan to have the F.B.I. control a vast communications network that would aid in moving criminal-history records around the country long has been a subject of controversy. So profound were these reservations, in fact, that three past attorneys general—Edward H. Levi, Griffin B. Bell and Benjamin R. Civiletti—turned down F.B.I. requests to build earlier versions of the expanded computer system that now has been given the green light by the Reagan Administration.

Objections to the system by the former attorneys general were based on three major worries.

The first concerned the communications network itself. In the interest of promoting the just and fair use of such a system, should control of the network be vested in a Federal agency other than the F.B.I.—an agency not directly involved in law enforcement? Would a network controlled by a powerful Federal agency tend to alter the relationship between the Federal Government and the states? Would it be best if a consortium of states ran the network?

Since the earliest days of American history, law enforcement has been a profoundly local business. Sheriffs are still locally elected in most parts of the United States. So are district attorneys. Most criminal acts are defined by state legislatures and most criminals are sentenced by state or local judges according to the mandate of state laws. Even the F.B.I. is aware that a national communications system that explicitly empowers the bureau to force local and state agencies to meet Federal standards of accuracy and completeness would somewhat modify the fundamental structure of government laid down by the Constitution.

The second concern centered on questions about the records that would be transmitted by the network. Would the increased distribution of records that frequently are incomplete or inaccurate reduce the efficiency of the police? Would these records reduce the opportunity for a fair trial? Would the growing use of these records by employers and others outside the criminal-justice system, a practice common now in many states, lead to situations in which individuals turned to crime because they were unjustifiably denied a job?

The third concern involved a question about the combined impact of the proposed communications network and the masses of information contained in the data bases of the states. Could such a system be used to keep track of citizens who are not criminals?

The intense debate over expanding the F.B.I.'s computer network is the major reason for the 10-year delay in its development. The F.B.I. got initial approval to begin building the basic computer system in 1966 from Nicholas de B. Katzenbach, the Attorney General at the time. In 1970, Attorney General John N. Mitchell decided the F.B.I. could begin developing the expanded versions of the system, which would handle criminal-history records. It was this decision that engendered the opposition that continues to this day. The debate represents one of the few occasions when an attempt has been made to weigh and balance the consequences of a massive flood of information before the floodgates are lifted.

One of the first public criticisms of the plan came in 1974, when President Ford's Office of Telecommunications Policy denounced a tentative Justice Department decision allowing the F.B.I. to enlarge its communications system to handle criminal-history records. The White House office said such a system "could result in the absorption of state and local criminal data systems into a potentially abusive, centralized, Federally controlled communications and computer information system." The criticism was made by John M. Eger, the acting director of the office, in a letter to Attorney General William B. Saxbe.

At the same time, Senator Sam J. Ervin Jr., Democrat of North Carolina and chairman of the Senate Subcommittee on Constitutional Rights, debated the merits of the project with Clarence M. Kelley, then the director of the F.B.I., at a public hearing. "For one man to have control of crime data might be more efficient," Senator Ervin declared. "But this country wasn't based on the idea of efficiency so much; it was based on the idea of power diffused."

The criminal-history records that the F.B.I. would like to have transmitted around the country with the help of its computers originally were collected by local policemen for their own purposes. In the beginning, the records were nothing more than an alphabetical list of people who ever had been arrested in a locality. During the last quarter of a century, there has been a move to have the records reflect the actions taken in each case by the prosecutor, the judge and prison authorities. There also has been a gradual development of central organizations at the state level that collect and dispense the records.

Not much is known about local record holders. Thanks to a major research program by Congress's Office of Technology Assessment, however, much more is known about the records and record keepers at the state and Federal levels—about who holds the records, how accurate they are, who has access to them.

A national survey completed for the Office of Technology Assessment in 1980 determined that state repositories contained 34 million criminal-history records. The same survey found that two-thirds of the states operated computerized systems that within seconds can provide a policeman, district attorney or judge with either a summary of an individual's record or instructions about where the record is stored in manual files.

The survey also found that in 31 states (the other states either did not know the answer or did not reply), more than 20,000 criminal-justice personnel had immediate access to computer terminals leading directly to automated filing systems.

Over the years, a large number of state and local records have been collected by the Federal Government. They are one measure of the vast reach of America's law-enforcement agencies. In Washington, the principal repository for these criminal records is at the F.B.I. It contains about 78 million fingerprint cards representing 21 million people arrested on local, state and Federal criminal charges.

No one knows precisely how many Americans have been arrested. The number is hard to determine because some individuals are arrested in more than one jursidiction and many records described individuals who are dead. In a recent authoritative study financed by the Labor Department, however, Neal Miller, a lawyer, estimates the number of living Americans with a record is astonishingly high. Mr. Miller's study, which has not been seriously challenged, concluded that one out of five living Americans, approximately 40 million people, have an arrest record in the United States. The estimate excludes most traffic offenses, which normally are disposed of by a summons or ticket rather than an arrest. Arrest records can include such things as disorderly conduct, a teen-age prank or public drunkeness.

The estimate of the number of Americans with a record must remain something of a guess because there is no single clearinghouse for such information. The F.B.I., for example, does not record the arrests of those under the age of 18 or the arrests of people for less serious crimes, and local police agencies frequently do not report arrests to state criminal-history agencies even when requried by law.

To make his estimate, Mr. Miller examined the records held by four jurisdictions—the F.B.I., New York state, New Jersey and California. For each jurisdiction, he made the appropriate modifications: adding the juveniles in the case of the F.B.I., for example; subtracting the number of people whom the actuarial tables suggested were dead. Finally, he multiplied the number of arrested persons that appeared to live in each jurisdiction so that it would be a projection for the entire country. The separate projections ranged from 38.8 million 46.5 million. But for a number of technical reasons, Mr. Miller concluded that 40 million was the most likely number.

Another important question about the proposed system is how accurately the records describe what has happened to those who are detained by the police. To get the answer, the Officer of Technology Assessment arranged for Dr. Laudon to obtain a random samples of the records of three states—North Carolina, California and Minnesota—and the F.B.I in 1979 and 1980. Dr. Laudon compared the information presented by his sample with the original information about the individual cases in the files of local courts or prosecutors. Dr. Laudon found that a significant proportion of samples of state and F.B.I. record contained no information about what happened after a person was arrested. Because one-third of all arrests are dismissed before coming to trial and because individuals in a smaller number of cases are found innocent after trial, the existence of millions of records without any notation of the disposition creates a significant potential for misuse of these records.

Dr. Laudon found that in North Carolina there was no disposition data in 39.1 percent of the records. In California, such information was lacking in 42.3 percent. The most complete records were found in Minnesota, where only 15.5 percent lacked disposition information. In terms of the percentage of records that the investigators judged to be complete, accurate and unambiguous, only 12.2 percent of the records

in North Carolina, 18.9 percent of those in California and 49.4 percent in Minnesota met the standard suggested by Federal regulation.

The quality of the records in the F.B.I. files, which are based primarily on information provided by the states, was not noticeably better. Based on a random sample of records sent out by the F.B.I's identification division during a single week in 1979, Dr. Laudon found that only one out of four were complete, accurate and unambiguous. Assuming the sample is an accurate one, this means that during a single year the F.B.I. disseminated about two million records that did not meet the Federal standards of accuracy, completeness and clarity as established by a stopgap law passed by Congress in the mid-1970's. The precise findings were as follows: 40.3 percent of the records did not include a disposition; 20.2 percent were judged inaccurate; 7 percent had incomplete dispositions, and 6.5 percent were determined to be ambiguous. In only 25.6 percent of the cases were the records complete, accurate and unambiguous.

The F.B.I. strongly objects to the Office of Technology Assessment research. Conrad S. Banner, deputy assistant director of the identification division, wrote the O.T.A., saying: "The criteria chosen by O.T.A. to judge the quality of records appear to have been set at levels which criminal-history record systems will never be able to completely achieve because of the limited types of information the systems contain, how the information is compiled, the limited resources available to compile the information."

David F. Nemecek, head of the F.B.I. information center, said the O.T.A. research contained "many factual inaccuracies" and undocumented conclusions which are "the basis for ill-founded alternatives." In testimony last year before the House Subcommittee on Civil and Constitutional Rights, he said that the F.B.I. has "serious concerns regarding certain study methodologies, certain definitions that were used in terms of what is accurate, what is complete, etc."

But in response to a question from Representative Don Edwards, Democrat of California, the chairman of the subcommittee, the F.B.I. information head acknowledged that the files do indeed have problems of quality and that correcting them raised constitutional questions. "It concerns me very much that we don't have disposition data," Mr. Nemecek said, listing several steps the bureau had taken to try to improve record quality. "As you are well aware, we are operating a voluntary system and trying to balance states' rights versus Federal rights."

Many policemen are enthusiastic about the F.B.I. plan to enhance the distribution of the criminal-history records, sometimes called "rap sheets." But Dr. Laudon, in a report to the O.T.A., also found a number of officials who questioned the value of the F.B.I. proposal on a variety of grounds. The officials discussed their reservations with him with the understanding that they would not be quoted by name.

"The idea that a national rap-sheet system would make an important contribution to our work here is just a bunch of baloney," the skeptical supervisor of a burglary section in the police department of Oakland, Calif., told a researcher. "Our problem is not to find out who the guy is; our biggest problem is once we catch him coming out of a house with the goods, how do we keep him in jail and how do we make sure he stays in jail? If anything, we have overinformation-oriented and overcomputerized this department. The patrolman learns to use the vast array of information resources at his command, which means you learn to sit in a car and punch in the numbers of people's license plates and the numbers of people's licenses. What it does is inhibit the development of traditional police skills, of interviewing, interrogating and investigating. We need people to get out of their offices and get out of their cars and talk to people. Most of our leads come from citizens reporting a crime or having heard about a crime. Without these resources, which have nothing to do with computers and criminal histories, we would be dead."

But it is the gradually increasing use of these records outside the criminal-justice system—by banks, state licensing boards, employers and other institutions—that concerns many officials. "The most frightening thing about Federal and state [computer] systems is that they are incredibly difficult to protect from noncriminal-justice use," a Sacramento, Calif., judge said. "The situation in this state, where so much rap-sheet information is used to keep people unemployed, and hence inherently prone to crime, is absolutely frightening and outrageous."

Official records, of course, were used improperly long before the computer became an important part of every major public and private bureaucracy in the United States. But a government official in New York—a state that has worked hard to limit improper access to its criminal-history records—explained how the computer has enlarged the opportunity for abuse.

"Technology may not be the only villain, but it is one villain," he said. "Before high technology you could actually control information better; at least it could not

spread very far because it was impractical to transmit it. With computer systems, you can't control it anymore, largely because of the automatic interfacing of the systems which make it difficult for even us to know who's getting our information."

Through a variety of Federal and state laws, society has made the collective decision that individuals convicted of certain crimes may properly be denied certain privileges. Sometimes such individuals lose the right to vote. Sometimes they are prohibited from running for public office. Sometimes they are denied the opportunity to bid on Government contracts. But United States criminal law is based on the principle that an allegation or arrest without conviction should not be grounds for a loss of privileges.

Despite the existence of a Federal law limiting Federal employment checks to conviction records, and a few state statutes that bar private employers from even requesting arrest information, there is widespread evidence that the principle frequently is ignored. According to the O.T.A. report, the noncriminal justice use of criminal-history information controlled by the F.B.I. accounted for 23 percent of the total number of inquiries during fiscal 1981. This type of distribution was temporarily halted late last year because of the heavy volume of requests, but has now been restored. However, such use of criminal-history records from many state computerized data centers has continued unabated.

Estimating the proportion of private employers who actually obtain arrest data before they hire new employees is very hard. However, Neal Miller's Labor Department study concluded that "the majority of private employers and preponderance of large employers seek criminal-record information."

Mr. Miller also estimated that 26 million of the 40 million Americans with arrest records are currently employed or looking for work—one-quarter of the labor force—and it is almost impossible to generalize about the impact of criminal records on their lives. Certainly the bank that will not hire a convicted bank robber and the hospital that will not hire a convicted narcotics dealer can defend their actions.

There is evidence, however, that many employers regard any kind of record, no matter what the offense, no matter what the outcome of the case, a powerful mark against the individual applicant. More than a decade ago, two sociologists, Richard D. Schwartz and Jerome H. Skolnick, attempted to measure this kind of bias in an experiment in which they showed employers the application forms of men who were seeking menial jobs. The men were divided into four groups. Some had no criminal records, some had been arrested for assault and acquitted and had a letter from the judge explaining that acquittal meant they were innocent, some had been arrested for assault and acquitted but had no letter, and some had been convicted.

Thirty-six percent of the employers said they would hire the men with no record, 24 percent said they would hire the men who had been acquitted and had a letter, 12 percent said they would hire the men who had been acquitted and 4 percent said they would hire those who had been convicted.

It is this problem, among others, that has generated opposition in Congress during the last decade to the F.B.I.'s continuing efforts to build the system. The critics have included former Senator Ervin, Senator Edward M. Kennedy, Democrat of Massachusetts, and Mr. Edwards.

Mr. Edwards is still actively concerned about the F.B.I. plan. He said at his subcommittee's hearings in October 1981 on the F.B.I. computer project, which had undergone its first test in Florida that summer: "This has the possibility of discriminating against certain types of Americans, especially young Americans who have led disadvantaged lives, as many of them might have some kind of criminal record. They might be totally deserving of employment but the employer would simply toss the application aside."

Mr. Edwards, who was an F.B.I. agent early in his career, has other objections to the proposed system. "It is bad public policy to locate this repository in the F.B.I.," he said in an interview. "If the Federal Government should have any role at all, the repository should be outside the F.B.I., outside the Justice Department."

Dr. Laudon articulated some of the concerns underlying the position of Mr. Edwards and others in a report to the O.T.A. "The very same technology which law-enforcement officials believe will increase the efficient administration of criminal-justice records also creates an instrument of potential subjugation by a victorious foreign power, the internal subversion of the normal democratic process or, by the drift of bureaucratic growth, ever larger instruments of efficient administration. There is no technical difference between the instruments of subjugation and the instruments of efficient administration. The possibility exists, however remote, that the American society is building the tools of its own political demise."

But Mr. Nemecek is convinced that the current controls are adequate. "1984 is here," he said in a recent interview, "and it is not going to happen."

Under the guidelines establishing the National Crime Information Center in 1966, the F.B.I. declared that only persons who had been formally charged with a crime would be listed in the center's computer. A few years later, however, John V. Tunney, Democrat of California, then the chairman of the Senate Subcommittee on Constitutional Rights, announced that the F.B.I. had violated its own guidelines by using the center "to keep track of people who might be of interest to the F.B.I. for whatever purposes, including possible political reasons."

The subcommittee called the Justice Department to a hearing. Justice officials confirmed that from 1971 to 1974 the F.B.I. had instructed its information-center computer to sound an alarm any time a law-enforcement agency sent a message to Washington indicating that any one of about 4,700 individuals the bureau had decided needed watching was apprehended anywhere in the United States. When it is remembered that about one out of five Americans are arrested some time in their lives, and that there were thousands of individuals who were picked up for taking part in demonstrations during the 1960's and early 1970's, the potential for using the center for political tracking is apparent.

There are indications that the F.B.I. and some other law-enforcement agencies would like to resurrect the center's computers as a method for following persons of interest, even if they are not the subject of an arrest warrant. During a meeting of the center's policy board in 1981, Kier T. Boyd, deputy assistant director of the technical services division of the F.B.I. explained how Congress has opposed such tracking in the past but that there now seemed to be a shift in the public mood. He advocated asking Congress for permission to expand the scope of the center because it would be "a very material assistance to segments of the criminal-justice community." Following the assassination attempt on President Reagan, the Secret Service received permission from the Justice Department to establish a computer file on persons the Secret Service has decided may be a potential threat to the people they protect even though they have not formally been accused of any crime.

At a time when fear of crime and terrorism pervades the United States, the requests of law-enforcement agencies for additional powers can seem eminently reasonable and desirable. But it is also clear that changes that increase the power of an already formidable monument to the computer without thorough public discussion, Congressional hearings and the passage of legislation containing specific safeguards against possible abuse.

[From the Los Angeles Daily Commerce, Dec. 20, 1982]

BIG BROTHER PROTECTS THE PRESIDENT?

(By Seth Rosenfeld)

Under pressure to better protect the president ever since the attempted assassination March 30, 1981, by John Hinckley Jr., the Secret Service and the FBI have proposed a precedent-setting surveillance system that is drawing fire from civil libertarians.

The proposed system would authorize use of the FBI's National Crime Information Center (NCIC), a massive computer network of 64,000 state, local and federal criminal justice agencies, to monitor law-abiding citizens, if the Secret Service considered them a threat to the president.

Secret Service (SS) claims the proposed program, which could go into effect early next year without congressionl approval, is a "potentially valuable tool" in protecting the president and other protectees from people like Hinckley, Sara Jane Moore and Sirhan Sirhan.

But some law enforcement officials say the plan would be "worthless." And civil rights advocates compare it to the FBI's political surveillance in the 1970s and charge that it would be the first step toward using NCIC as an intelligence tool—something for which it was never intended.

To provide "preventative protection" to the president, SS currently maintains a computer list of 25,000 potential assassins. The agency focuses on a smaller group of "dangerous individuals" who allegedly have threatened the president. Every three months, SS agents interview them, gathering information on the psychological, criminal and political background. As of last April, SS listed 383 "dangerous individuals," 257 of whom were confined to prisons or mental institutions, while 125 had no outstanding warrants and were "at large."

WARNING: SUBJECT IS A THREAT TO U.S. SECRET SERVICE PROTECTEE

Under the proposal, SS would place data on these 125 people into the FBI's NCIC data bank. Whenever any of the law enforcement agencies in the NCIC network had contact with them, such as during a routine traffic check, the officer would get a message like this over this car terminal, according to an FBI memo:

"Warning—Subject Is a Threat to U.S. Secret Service Protectee. Immediately Contact Secret Service Headquarters for Further Information."

The message would instuct the officer to make no arrest based on this information. It also would give the subjects' physical description and a notation that SS considers them "mentally unstable" or "armed and dangerous." Thus SS could monitor the activities of people it deems dangerous, even if they are law-abiding citizens who have committed no crime.

In the aftermath of the Hinckley attempt, the plan gained swift approval from the FBI, the attorney general and the Treasury Department, of which SS is an arm. But on Capitol Hill the plan hit a snag. In a letter to SS Director John Simpson, Rep. Don Edwards, D-Calif., expressed "grave concern" about criteria for listing people and what data would be collected and disseminated on them.

"While your objective is obviously well intentioned . . . it may have the unintended effect of creating an unfavorable precedent without the careful review and analysis we prefer," wrote Edwards, a former FBI agent who chairs the Subcommittee on Civil and Constitutional Rights.

Secret Service spokespersons declined to discuss such questions with a reporter, but SS and Justice Department memos described how the SS determines who qualifies as a "dangerous individual."

First, SS sifts through the more than 25 reports of theats it receives each day from "numerous and varied means." If the threat was written, or reported by a reliable source, two SS agents interview the person who allegedly made the threat. If the agents determine he or she could carry it out, they send an evaluation of "dangerous" to their field supervisor. If the supervisor agrees, the evaluation is sent to Washington for final review before approval for the list.

Secret Service claims it takes great care in who it counts as "dangerous."

"We cannot stress enough that the evaluation of 'dangerous' is not arrived at lightly during an investigation," said Director Simpson in a letter to Rep. Peter Rodino, D-N.J., who chairs the House Judiciary Committee.

In a report the FBI concluded that "the potential effect of this proposed system on the privacy and other personal or property rights of individuals will be negligible. . . ."

But a study last October by the Office of Technology Assessment, a congressional research branch, warned that such use of NCIC could result in "unwarranted invasions of privacy and improper arrests or detention." Other observers charge that the plan would turn NCIC inside out—from a service which provides law agencies around the country with listings of stolen cars, missing guns and people wanted for serious crimes, into a centralized surveillance system using those agencies to funnel information to the FBI and SS.

"It would be the first time NCIC could be used as an intelligence tool, the first time NCIC could be used to list people charged with no crime," commented one congressional staffer.

The American Civil Liberties Union's legislative director, Jerry Berman, called SS's "dangerous individuals" list "open-ended."

"They (SS files) are full of derogatory information, unsubstantiated allegations and charges," Berman said. "We think it would be very dangerous to have that information floating around to policemen all over the country and letting them feed back into the system."

Berman and other observers compared the SS proposal to the FBI's unauthorized use of NCIC as a part of its unconstitutional and illegal COINTELPRO to "disrupt and neutralize" lawfull protest during the early 1970s.

Secret Service claims that use of NCIC would have several benefits, allowing agents to keep closer track of people on its dangerous individuals list, providing immediate notice of their involvement in "criminal activity which could be related to protectees," and alerting officers that the person they are dealing with may be unstable or armed.

But even law enforcement officials are at odds over whether the system would make the president any safer. SS admits that out of the last five attempts to assassinate a president, only one would-be assassin, Lynette "Squeaky" Fromme, was on its list of dangerous individuals, and she managed to attempt to shoot President Gerald Ford anyway.

"Their hit rate is zero, and my reaction is that it will always be zero," an official said.

Congressman Edwards plans to hold hearings on the SS proposal before his subcommittee on the near future.

[From the Pittsburgh Press, Jan. 2, 1983]

COMPUTER IN PITTSBURGH AND ALLEGHENY COUNTY, PA., POLICE WORK

(By Mary Niederberger)

Detective Ron Shaulis can organize a lineup of suspects without leaving his seat on the third floor of the Public Safety Building.

Shaulis, chief identification officer for the city police, has a computer with records in it of all persons arrested in Pittsburgh and Allegheny County.

The system, set up in 1979, is beginning to prove its worth to detectives. Criminals no longer can hide from police in a maze of file folders.

Their habits, history and physical characteristics can be found in a matter of seconds.

Shaulis said the system already has been used to solve several rape cases. One victim recalled her assailant had a curled ear.

The computer printed out a list of convicted rapists fitting the description. The girl was shown photos of the men and identified her attacker.

The computer system "has already made so many more things possible for us," Shaulis said.

And he believes hook-ups with 92 local police stations in the county will help even more.

Before identification was computerized in 1979, he explained, a criminal record consisted of a card with the criminal's name, mug shot, description, crime and identification number, which came with a manila folder holding fingerprints and any other information available.

"We filed them by names and nicknames and that was it," Shaulis said.

"It was almost impossible to tell exactly how many robbers or rapists we had, unless someone would physically go through the files and count them, which would take forever.

"Now, all we have to do is plug into the computer a name, nickname, crime or peculiar physical attribute of an individual and within a matter of minutes we will get a printout of everyone in our files with that particular characteristic asked for."

Before the computer and the merging of city and county records, both police departments kept about 100 filing cabinets with data on 90,000 criminals. About 80 percent of the files were duplicates, Shaulis said.

These records are now in the computer banks at the identification center. Microfilm replaces the manila folders as storage for rap sheets and other information.

Though it's housed with the city police, the ID center keeps criminal records of everyone arrested in Allegheny County. Even individuals arrested by local police departments are processed through the city ID center.

"It would be foolhardy for chiefs of local police departments not to contribute their arrests to this Bureau of Criminal Identification. There may be that one person that we are looking for who is not in that computer if they don't," Shaulis said.

The information in the city and county files is available to local police officers upon request. As the system expands in the next several years, Shaulis said he hopes each local department will have a computer terminal.

McKeesport is the first local police department to have direct access to the system. The sheriff's office, district attorney and county police have terminals.

Shaulis said the computer was used to solve the October 1980 slaying of Robert Karcz of Scott Township.

Karcz, whose nude body was found in a pile of leaves in Schenley Park, was lured by a prostitute to an Uptown apartment, where he was handcuffed, choked with plastic tubing and then drowned in a pan of water.

Police were led to the murderers by looking at mug shots of everyone arrested for prostitution—a list provided by the computer.

One of the female prostitutes involved with the murder was identified by her mug shot.

She later agreed to cooperate with police and implicated a man and another woman who were involved in the crime. All three were convicted and given jail sentences.

"Without the original list from the computer, it would have been impossible to get together the mug shots," Shaulis said.

Although the sytem is limited to information on individuals with criminal records, Shaulis pointed out last year's arrest statistics show about 51 percent of the 12,176 people arrested in Allegheny County were repeat offenders.

The cost of operating the sytem—$800,000 a year—is shared by the city and county police. The original conversion to computers was financed with a $500,000 federal grant.

The FBI has a similar system that files criminal records of everyone arrested in the nation—36 million.

The agency eventually wants to connect this system to police departments in major cities, banks, employers and other civil institutions.

Researchers from Congress' Office of Technology have found that almost half of a sample of such records kept by the FBI were either incomplete or inaccurate. These records were transmitted to the FBI by local police departments.

Opponents of the FBI system feel it will do more harm than good by spreading the inaccurate records across the country.

They feel that communicating criminal records to all of the parties indicated will increase the accessibility of the information—possibly to unauthorized individuals.

A survey for the Office of Technology Assessment in 1980 showed two-thirds of the states operated computerized systems.

The survey found that in 31 states more than 20,000 people had access to the computerized filing system.

Shaulis disagrees with opponents of the computerized system. He claims Allegheny County records are accurate and he said only authorized personnel will be given passwords to allow them access to the computers.

He pointed out that criminal convictions are public record and are on file at the courthouse.

"I wish we could get into a national hook-up. The availability of an immediate rap sheet and fingerprint classification would expediate the process. It would also let us know right away if a person we have brought in is wanted in another state," Shaulis said.

[From the New York Police Magazine, January 1983]

Many FBI Files are Inaccurate, Study Finds

Every day, thousands of police departments and state agencies, as well as banks and other employers, tap into the FBI's vast computerized criminal files, which contain the arrest records of millions of Americans. A report released by a congressional research team has found that such a system, if accurate and well managed, can improve law enforcement. But the same report also found that almost half of the records they sampled for the study were either inaccurate or incomplete.

The survey, entitled "An Assessment of Alternatives for a National Computerized Criminal History System," was conducted by researchers at the Office of Technology Assessment (OTA), a branch of Congress.

Before Congress approves the proposed national computerized library of criminal histories, the report said, it should consider the impact the system could have on people's lives if the information were inaccurate or misused. According to the report's principal author, Fred Wood, such information has traditionally been controlled by law enforcement agencies. But with the instant accessibility of computers and the difficulty of controlling such a data bank, Congress is considering shifting responsibility to a wider range of government branches.

The report found that FBI criminal records are being used increasingly to determine if an individual should be hired for a job, licensed for a profession or admitted to a training program. The report supported the use of criminal records to screen individuals who might be a threat to co-workers, other citizens or valuable assets. But it expressed concern that people on whom inaccurate files are kept—and there are perhaps 15 million according to OTA statistics—were "potentially exposed to employment disqualification because of an arrest record." The researchers concluded that Congress should consider who should have policy control over the system, who should have access, and what standards should be used to determine completeness and accuracy of information.

The study was based on 333 files, taken from the millions that were sent out in 1979. Half were drawn from the FBI Identification Division Criminal File, which is the modern equivalent of the manual rap sheet system. Only a third of the data in this file has been computerized. The other samples came from the newer, but much smaller, National Crime Information Center (NCIC) computerized data bank of criminal history records. According to author Wood, only eight states contribute actively to this system. There is no federal law requiring states to contribute.

The records were then compared with files from the police departments that produced them originally. The study showed that both FBI systems had problems. In the Identification Division, 29.6 percent of the records contained no final disposition on the cases listed, and an additional 20.2 percent contained information on disposition, sentencing or charges that was inaccurate. The NCIC records were only slightly better, with 27.1 percent without a disposition, and 19.4 percent incorrect.

According to Wood, these results are consistent with a survey OTA did of states' disposition reporting systems. They concluded that about one-third of all court dispositions are not being reported to state criminal record depositories. In 14 states, they found that fewer than 25 percent of court dispositions were being reported. The potential damage is serious, Wood said. "You want people to be treated according to their true record." This is especially important because of the increasing reliance of employers on these criminal records, he stressed. Through professional associations or state licensing boards, banks, security firms and other employers with sensitive business can submit names or fingerprints for cross-checking with FBI files. "If they've got the people and a couple of them have arrest records," said Wood, "forget it."

FBI spokesman Calvin Shishido agreed that many of the inaccurate records resulted from the failure of local law enforcement agencies to send in dispositions, updates or corrections. The sheer number of records makes it nearly impossible for the FBI to keep track of them. According to Shishido, there were, as of last October, 80,192,114 criminal records in FBI files, including many duplications.

The study also raised the possibility that such a system may be used to monitor the lawful activites of individuals or organizations. "To understand this concern," the OTA report said, "one must remember that the debate over the national computerized criminal history system began in the late 1960's and early 1970's, when the FBI was engaged in domestic political intelligence and surveillance activitites. . . ." The report noted that last September, the Justice Department agreed to a Secret Service request to start files on persons considered a threat to officials guarded by the Service—even if those suspected had not been "formally charged with a criminal offense."

Sen. Charles Mathias of Maryland, chairman of the Subcommittee on Criminal Law of the Senate Judiciary Committee, concluded that, "Verifiable and accessible criminal history information will improve the efficiency of our criminal justice system. . . . But the records of the system must be complete and accurate; they must be safe-guarded against improper access and dissemination; and their contents must be limited to the minimum necessary to accomplish the system's goals."

[From the New York (N.Y.) Nation, Feb. 5, 1983]

Computer Dragnet

Sometime in the next few weeks, armed with an order from Attorney General William French Smith, the Secret Service will break into the F.B.I.'s computer and add a list of prospective criminals to a more comprehensive compilation of the names of millions of citizens who have already broken the law.

The new list is short; it is made up of the names of some 125 "dangerous individuals" who the Secret Service believes possess the will or the desire to harm the President or another of its "protectees," a group that includes such public figures as Ron and Doria Reagan, Senator Edward Kennedy and Jacqueline Onassis. The dangerous ones have no outstanding warrants but are considered potential plotters "at large."

The longer list is in the data bank of the F.B.I.'s National Crime Information Center (N.C.I.C.), a computer system which taps the files of 64,000 local, state and Federal criminal justice agencies. The "criminals" in the silicon soul of the new machine may have stolen a book or hijacked a 747, but any bad mark in their copy books can be retrieved at a moment's notice with one telephone call. A patrolman who stops a speeding motorist in Montana will learn whether his quarry is wanted for mass murder in New York or was once convicted for civil rights activities in

Alabama. How such case histories will affect the constabulary's attitudes or the judicial disposition of the case is not the computer's problem. It just gives the facts.

Once the new list has been added to N.C.I.C., a police officer making a routine traffic check, for example, may hear a voice squawk over his radio: "Warning! Subject is a threat to a U.S. Secret Service protectee. Immediately contact headquarters for further information." It's not hard to imagine what excitement that will provide on the berm of the Interstate.

The plan to add the names of noncriminals to N.C.I.C. was triggered by John Hinckley Jr.'s attempt to assassinate President Reagan two years ago. An F.B.I. advisory board on N.C.I.C. policy recommended that Congress review the expansion of the computer network. The Congressional Office of Technology Assessment warned that the projected new use of N.C.I.C. could result in "unwarranted invasions of privacy and improper arrests or detention." Civil liberties monitors worry that N.C.I.C. could easily change from a service providing quick access to the names of car thieves, unlicensed gunwielders and fugitives to a centralized intelligence and surveillance system.

It hardly seems to matter that the new system is of minimal value in accomplishing its ostensible purpose of protecting the President. The Secret Service notes that only one of the most recent would-be Presidential assassins—"Squeaky" Fromme—was listed as a "dangerous individual." The essential function of technological surveillance is not protection but social control. The powerful lobby of Atari bureaucrats is determined to wire the nation from one end to the other, and match up citizens with their surveillers in an all-encompassing computer dating game. The efforts of civil libertarians to shut down the system have so far done little but delay each succeeding development.

[From the Chicago (Ill.) Security World, February 1983]

In Washington—Critical Policy Definitions on Computer Security and Applications Stalled in Congress

(By David R. Heinly)

A year ago, the congressional Office of Technology Assessment (OTA), a think tank set up to analyze the policy implications of state-of-the-art technology, issued a lengthy report on the lack of security measures for computer-based information systems. The report underscored the ease with which computers and computer information network systems can be used to commit crime.

More recently, the OTA released another study, analyzing computers as crime-fighting tools; specifically in establishing a nationwide "Computerized Criminal History" system. Such a system, the OTA suggests, could offer important benefits for the criminal justice system and a broad range of non-criminal or non-prosecutorial functions such as employment, licensing and security checks.

In a sense, both studies represent two sides of the same coin: abuse of computer information systems. The first study discusses prevention of unauthorized use, tampering and sabotage. The second, known as the CCH system study, warns of the potential for abuse of a system set up to meet altruistic goals.

Both emphasize the essential bottom line: the need for a policy definition on the use and misuse of computer information systems.

Lawmakers' reluctance to get serious is, in a way, understandable. The legal, moral, constitutional and ethical questions are mind-boggling.

"The OTA's report (on the proposed CCH)," said Senate Criminal Law Subcommittee Chairman Charles Mathias, R-Md., "underscores the policy dilemmas that lie ahead. Verifiable and accessible criminal history information will improve the efficiency of our criminal justice system . . . But (the CCH system) must be safeguarded against improper access and dissemination.

"In the years ahead," Mathias said, "Congress will have to make policy choices that balance these concerns."

In December 1982, a Senate oversight subcommittee convened several days of hearings on the practice of computer "matching" by government agencies to detect fraud, waste and mismanagement in government welfare programs. For example, officials from state and federal agencies described the practice of matching computerized information on recipients of Social Security benefits to the size of their respective bank accounts.

But the hearings also brought out the legal and moral questions involved in this kind of investigation; questions involving constitutional guarantees of privacy and the presumption of innocence.

THE NEED FOR OVERSIGHT

Subcommittee Chairman Sen. William Cohen, R-Me., pointed out that laws, controls, and oversight of computer matching are lacking. Cohen also questioned how far the right of privacy can or ought to be abridged, even in the necessary campaign to prevent fraud and abuse.

It's up to Congress to find the answer before a meaningful policy on computer information system security can be defined. As the OTA points out, the hardware exists. The bottleneck is the absence of directives on how to use that equipment.

A computer system could be compared to a handgun in that it can help commit a crime or prevent it. It has emerged as a tool for both the lawbreaker and the law enforcer. As Congress attempts to define its proper use and minimize potential abuse, one can only hope they have better luck with the computer than they've had with handgun controls.

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